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No. _____

In The

Supreme Court of the United States

REALTY ONE, INC.,

Petitioner,

v.

RE/MAX INTERNATIONAL, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether under the doctrine of ancillary jurisdiction the district court had jurisdiction to hear a motion to enforce a settlement agreement when the order which dismissed the case with prejudice does not incorporate the settlement agreement into it or specifically retain jurisdiction to enforce the settlement agreement.

PARTIES TO PROCEEDING

In addition to petitioner Realty One, Inc., the following individuals and entities are parties to the proceeding in the court below:

RE/MAX International, Inc.; A.E.B.T.S., Inc. d/b/a RE/MAX Crossroads Properties; T.M.A.T.N.B., Inc. d/b/a RE/MAX Affinity, Inc.; D.F.I., Inc. d/b/a RE/MAX Results; Joseph P. Grady, Inc. d/b/a RE/MAX Xpress; McGrew Realty, Inc. d/b/a RE/MAX Key Realty; Property Professionals, Inc. d/b/a RE/MAX Property Professionals; RE/MAX Advantage, Inc. d/b/a RE/MAX Advantage; RE/MAX Northeast Ohio Limited Partnership; Zames Realty, Inc. d/b/a RE/MAX Specialists In Real Estate; Realty Properties, Inc. d/b/a RE/MAX Realty Properties; True Independence Partnership d/b/a RE/MAX Independent Associates; R.E.P., Inc. d/b/a RE/MAX Realty, and Smythe, Cramer Co.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Real Living, Inc., a privately-owned corporation, is the parent company and owns 100% of Realty One, Inc. No publicly held company owns 10% or more of Realty One, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Realty One, Inc. respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 271 F.3d 633 (6th Cir. 2001). The opinion of the district court granting respondent's motion to enforce settlement agreement with Realty One, Inc. (App., *infra*, 39a-66a) is unreported. The order of the district court dismissing the case with prejudice (App., *infra*, 67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2001).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1; "The judicial Power shall

extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States. . . . " U.S. CONST. art. III, § 2, cl. 1; "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. Amend. X. Pursuant to this Court's Rule 14.1(f) Federal Rule of Civil Procedure is set forth at App., *infra*, 75a-76a.

STATEMENT OF THE CASE

I. The Proceeding Below.

A. *The case is settled and dismissed with prejudice.* On July 14, 2000, the district court entered an order dismissing this action with prejudice. The order stated that the parties had entered into a settlement agreement the prior day, that the case was "dismissed with prejudice" and that "any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order." App., *infra*, at 67a ("dismissal order"). The dismissal order did not state that the settlement agreement was incorporated into it or that the court specifically retained jurisdiction to enforce the settlement agreement.

The previous day the parties entered into a settlement agreement after three days of negotiations supervised, in part, by the district court. With the assent of the parties, and in their presence, the district court dictated the terms of the settlement on the record. App., *infra*, at 68a-74a ("July 13th Settlement"). The agreement provided that this action would be dismissed with prejudice but

did not request that the district court retain jurisdiction to enforce the settlement agreement or for any other purpose. App., *infra*, at 70a.

B. *The complaint, appeal, trial, and mistrial.* In 1994, Re/Max International, Inc. ("Re/Max International") and several of its franchisees (collectively "Re/Max") filed the initial complaint in this action. Re/Max International sells franchises to persons who, in turn, sell residential real estate under the Re/Max system. The defendants were Realty One, Inc., ("Realty One"), the largest residential real estate company in Northern Ohio, and its largest competitor, Smythe Cramer Co. ("Smythe"). The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, 28 U.S.C. § 1337, and principles of supplemental jurisdiction, 28 U.S.C. § 1367. Generally, the complaint alleged that Realty One and Smythe had engaged in a conspiracy and anti-competitive conduct in violation of the federal and state antitrust laws to preclude Re/Max from competing in Northern Ohio.

In 1996, the district court entered summary judgment in favor of Realty One and Smythe. The Sixth Circuit reversed that decision, finding a dispute as to material facts, and remanded the case for trial to the district court. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999).

A jury trial commenced on April 7, 2000, before the Honorable David Dowd, who had presided over the case virtually from its inception. After approximately three months in trial, the court declared a mistrial with the

agreement of counsel for Re/Max. The case was transferred to Judge Gwin for retrial.

C. *The parties fail to agree on a more formal settlement agreement.* After entry of the dismissal order, the parties discussed the preparation of a more formal agreement concerning the settlement as contemplated by the July 13th Settlement. The discussions were unsuccessful. Realty One, however, complied with, and continues to abide by, all of the financial and business terms of the complete and binding July 13th Settlement.

On September 5, 2000, Re/Max filed a Motion to Enforce Settlement Agreement against Realty One. The motion claimed that Realty One breached the July 13th Settlement by not negotiating and executing a more formal settlement agreement. Re/Max requested that the court order Realty One to comply with the terms of either draft agreement attached to the motion. One draft was a modified version of a settlement agreement rejected by Realty One as inconsistent with the July 13th Settlement ("Re/Max draft"). The other draft was a variation of the first which, according to Re/Max, was the product of ongoing negotiations with Smythe to which Realty One was not a party ("Smythe draft"). Realty One opposed the motion noting that the court did not have jurisdiction in view of the dismissal order and that it objected to the terms of the Re/Max and Smythe drafts because they far exceeded the agreement reached on July 13th. A similar motion filed against Smythe was settled before the district court ruled. The district court did not hold an evidentiary hearing.

II. The Opinions Below.

A. *The District Court's Order.* On September 14, 2000, the district court entered an order captioned "Judgment." App., *infra*, at 39a. First, the court rejected Realty One's claim that it lacked jurisdiction to hear the motion to enforce. Citing this Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), the court stated that "supplemental jurisdiction allows a federal court to retain jurisdiction over future enforcement of a settlement agreement." App., *infra*, at 44a. The court went on to find that "it is well settled that 'courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them.' " *Id.* (quoting *Aro Corp. v. Allied Witan*, 531 F.2d 1368, 1371 (6th Cir. 1975)). In view of these principles, the district court concluded that it had "expressly retained jurisdiction" because " 'all that is necessary [to do so] is that it be possible to infer that [the trial judge] did intend to retain jurisdiction.' . . . " App., *infra*, at 44a-45a (quoting *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985)). The court did not mention the fact that the July 14th dismissal order does not state that the court retained jurisdiction to enforce the settlement agreement or incorporate the settlement agreement.

Second, the district court concluded that Realty One had breached an agreement to negotiate and write formal settlement papers. The district court then wrote a new settlement agreement for the parties, taking most but not all of the basic terms of the July 13th transcript, adding expansive definitions and terms from the Smythe draft to which Realty One had objected, and inserting others. An appendix to the Judgment sets forth detailed dispute resolution procedures taken from the Smythe draft, App.,

infra, at 57a-66a. (The July 13th Settlement stated that all disputes would be settled through arbitration but did not specify the procedures. App., *infra*, at 71a.) The district court ordered Realty One to comply with the court's new settlement agreement.

B. *The Sixth Circuit Opinion.* The court of appeals affirmed the district court in a two-to-one decision. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633 (6th Cir. 2001). Initially, the court reviewed the record noting "[a]fter the parties reached a settlement agreement, the district court dismissed the case with prejudice without incorporating the terms of the agreement into its order or explicitly stating that it was retaining jurisdiction to enforce those terms." *Id.* at 636.

The circuit court began its analysis by noting that under *Kokkonen* a district court only retains jurisdiction to enforce a settlement agreement after dismissal of the action with prejudice in two limited circumstances: (1) where the agreement is incorporated into the order of dismissal; or (2) where the dismissal order specifically states that jurisdiction is being reserved to enforce the settlement agreement.

Two prior Sixth Circuit decisions which followed *Kokkonen* were dismissed as dicta. *Caudill v. N. Am. Media Corp.*, 200 F.3d 914 (6th Cir. 2000); *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000). The court stated that *McAlpin* and *Caudill* only involved the "incorporation" and not the "express retention of jurisdiction" exception without explaining the significance of the distinction. *Re/Max Int'l*, 271 F.3d at 643-44. In any event, *Kokkonen*, the court noted, did not require the

conclusion reached in *McAlpin* – holding that after dismissal with prejudice the district court did not have jurisdiction to enforce a settlement agreement where the dismissal order only referred to the agreement and included only one provision from a multi-page agreement – stating that the decision misquoted Justice Scalia's opinion. *Id.* at 644. The court thus concluded that no "magic form of words" such as "expressly retained jurisdiction" is required by *Kokkonen*. *Id.* Citing its decision in *Aro Corp. v. Allied Witan*, 531 F.2d 1368 (6th Cir. 1975) for the proposition that "courts have inherent powers to enforce agreements executed in settlement," the court concluded that historically the Sixth Circuit had not adopted the type of narrow interpretation of jurisdiction represented by *McAlpin* and *Caudill*. *Id.* at 645.

In reviewing the post-*Kokkonen* decisions of other circuits, the court below drew support from *Bell v. Schexnayder*, 36 F.3d 447 (5th Cir. 1994) and *Ford v. Neese*, 119 F.3d 560 (7th Cir. 1997). Both decisions held that the dismissal order need not specifically state that jurisdiction is being reserved. Footnotes to the discussion about *Bell* and *Ford*, however, quote the dismissal orders from each case. Each dismissal order provided that the dismissal was without prejudice and reserved the right to hear the specific motion at issue in each case. *Re/Max Int'l*, 271 F.3d at 644, n.9, n.10.

The court discussed, but declined to follow, the decisions in *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37 (2d Cir. 1996) and *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995). Each of those cases held that for the court to retain jurisdiction to enforce the settlement agreement, an order dismissing the case with prejudice must specifically state

either that the agreement had been incorporated into the order or that jurisdiction was being retained to enforce the settlement agreement. *Re/Max Int'l*, 271 F.3d at 644. In addition, the court distinguished these two cases, along with *Kokkonen*, *McAlpin* and *Caudill*, based on the fact that they were dismissed under Fed. R. Civil Pro. 41(a)(1) rather than Rule 41(a)(2) which, the court stated, was the basis for dismissal in this case. *Id.* This distinction is important, the court noted, because the former provides for dismissal on stipulation of the parties but does not provide that the court can add conditions to the order. The latter however, provides for dismissal on motion of the plaintiff and expressly states that the court can add conditions to the dismissal order. The court did not mention the fact that the July 14th dismissal order, which cites the settlement agreement, does not refer to any provision from the Civil Rules or Re/Max's statement in its circuit court brief that the dismissal was not under Rule 41(a)(1).

In the remaining portions of its opinion the court affirmed the findings of the district court regarding the terms of its settlement agreement, essentially reviewing the new terms and provisions and determining that they were reasonable or that Realty One's objection to adding them was not well founded. *Id.* at 645-50.

C. *The Dissent Of Judge Wallace.* Circuit Judge Wallace, sitting by designation, dissented because "[t]he majority opinion is contrary to the Supreme Court's ruling in *Kokkonen* because it disregards the presumption against federal jurisdiction and expands the district court's jurisdiction to enforce the settlement agreement beyond the plain meaning of the dismissal order." *Re/Max Int'l*, 271 F.3d at 651 (Wallace, J., dissenting). According to

Judge Wallace, the majority's approach is also inconsistent with *McAlpin* and *Caudill*, both decided the prior year by the Sixth Circuit. *Id.* at 652.

Kokkonen holds that "to retain jurisdiction to enforce a settlement agreement, a district court must either include a 'separate provision [in the order of dismissal] (such as a provision 'retaining jurisdiction' over the settlement agreement) or . . . incorporate the terms of the settlement agreement in the [dismissal] order" according to Judge Wallace. *Id.* at 650 (quoting *Kokkonen*). Here neither requirement was met. Thus, Judge Wallace noted, the district court did not have jurisdiction to hear the motion to enforce settlement.

Judge Wallace went on to state that the approach of the majority that "the district court's dismissal order . . . does not mean what it clearly says but, instead, means what this court thinks it should have said" is inconsistent with *Kokkonen* and the presumption against federal jurisdiction which can not be expanded by judicial decree. *Id.* at 651. While formalistic language is not required to reserve jurisdiction – and regardless of the merits of the approach used by the majority of trying to "divine the district court's intent" – the order in this case is clear and unambiguous and there is no circumstantial evidence to support a claim that the district court retained jurisdiction to enforce the settlement agreement Judge Wallace noted. *Id.* at 652. Judge Wallace concluded by stating that "[f]ederal jurisdiction is a precise doctrine. It does not exist here. I would rely upon the reasoning in *Kokkonen* and our own case law and hold that the district court did not have jurisdiction to enforce the settlement agreement.

Re/Max should have brought a separate claim in state court." *Id.*

REASONS FOR GRANTING THE WRIT

This is an important case because the decision of the circuit court below is directly contrary to this Court's decision in *Kokkonen,* to the decision of every post-*Kokkonen* federal circuit which has considered the issue, including those from the Sixth Circuit, and is erroneous. *See Re/Max Int'l,* 271 F.3d at 651 (Wallace, J., dissenting). The single question presented here concerning federal jurisdiction affords the Court a rare opportunity to consider and establish three important points: (1) the limits on federal jurisdiction and the lack of authority by the district courts to extend that judicial power by decree; (2) the authoritative nature of this Court's decisions and their binding nature on the lower federal courts; and (3) to resolve a split among the circuits created by the decision below on an important jurisdictional question thus avoiding an extension of district court jurisdiction by judicial decree into those areas reserved for the state courts.

I. The Circuit Court's Decision Is In Direct Conflict With This Court's Decision In *Kokkonen*.

In *Kokkonen,* this Court held that absent an independent jurisdictional base, a district court only has jurisdiction to hear a post dismissal with prejudice motion to enforce a settlement agreement when the moving party demonstrates that resolving the motion is within the

court's ancillary jurisdiction by, in effect, being an action on a court order. *Kokkonen*, 511 U.S. at 380-81. Otherwise, the action is outside the jurisdiction of the district court.

As this Court held in *Kokkonen*, a motion to enforce a settlement agreement is a suit on a contract and is thus presumed to be outside the court's jurisdiction. *Id.* at 378 ("enforcement of the settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction"). As in any other case, the proponent of jurisdiction must demonstrate either that there is an independent jurisdictional base (an issue not present here) or that the action is within the court's ancillary jurisdiction – courts do not have "inherent authority" to hear such a matter, even if the settlement agreement arose from a case once in the district court. *Id.* at 377, 380-81.

A matter is only within the district court's ancillary jurisdiction if it is either (1) sufficiently related to the claim on which the action is based or (2) directly related "to the court's power to protect its proceedings and vindicate its authority. . . . " *Id.* at 379-80. The first prong of ancillary jurisdiction assesses the relationship between the claims on which the suit is based and those over which it is requested that jurisdiction be asserted. *Id.* at 380. In contrast, the second focuses on whether an order of the court was "flouted or imperiled" by the claimed breach of the settlement agreement: that is, whether the suit on the settlement agreement is, in substance, a suit on the court order because either the order of dismissal incorporates the settlement agreement or the court specifically retained jurisdiction to enforce the settlement agreement. *Id.* at 380-81. Since *Kokkonen* held that the first

prong of ancillary jurisdiction cannot be met under the circumstances here, the only question is whether the second prong is applicable. *Id.* at 380.

Kokkonen held that an action to enforce a settlement agreement is within the second prong of ancillary jurisdiction if the district court's dismissal order includes a "separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or . . . incorporat[es] the terms of the settlement agreement in the order." *Id.* at 381. In either situation, the suit on the alleged breach of the settlement agreement effectively becomes a suit based on a claimed violation of a court order, thus giving rise to ancillary jurisdiction. *Id.*

The circuit court below did not conclude that the claimed breach of the settlement agreement at issue here was in substance a violation of any court order. Indeed, the court failed to address the key issue under *Kokkonen*: whether any order of the court had been violated or required aid or vindication. Yet under *Kokkonen*, such a determination is critical to any assertion of jurisdiction under the circumstances here. *Id.* at 381-82.

The reason the court failed to find a violation of a court order is clear: no court order was at stake in the proceedings below. Re/Max never suggested that any party had violated any court order in its motion to enforce, only that there was a breach of an agreement to agree to write a more formal settlement agreement.

The lower court failed to follow *Kokkonen* or even consider the critical question of ancillary jurisdiction, focusing instead on whether *Kokkonen* required what it called a "magic form of words" – specific language to

retain jurisdiction – or if unexpressed intent was sufficient to retain jurisdiction. Following *Kokkonen*, however, does not require using a magic form of words or searching for unexpressed intent but only the application of the fundamental principles of ancillary jurisdiction which were ignored by the court below. *See Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995) (following *Kokkonen*); *In Re: Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 275 (3d Cir. 1999) (following *Kokkonen*); *see, e.g., Schaefer Fan Co. v. J&D Mfg.*, 265 F.3d 1282, 1287 (Fed. Cir. 2001) (noting that "a district court need not use explicit language or 'any magic form of words' to effect a valid incorporation of an agreement into an order") (citations omitted).

Finally, whatever the meaning of the last sentence in the dismissal order of July 14th – the predicate for the lower court's determination – and regardless of whether the district court had authority to add that provision to the order, one point is clear: as the circuit court below admitted, that sentence does not state that the settlement agreement was incorporated into the dismissal order or that jurisdiction was specifically reserved to enforce the settlement agreement. Thus, the court did not and could not conclude that the alleged breach of the agreement to write more formal settlement papers constituted a breach of any court order. The circuit court's decision, holding that the district court properly exercised jurisdiction over the motion to enforce, is thus directly contrary to *Kokkonen*.

II. The Decision Below Is In Direct Conflict With The Decision Of Every Other Post-*Kokkonen* Federal Circuit Court.

Every circuit court which has considered the issue presented here has held that a district court only has jurisdiction over a post dismissal motion to enforce a settlement agreement if that action comes within the court's ancillary jurisdiction as delimited by *Kokkonen*. The decision of the Second Circuit in *Scelsa* is typical of these decisions. *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37 (2d Cir. 1996).

In *Scelsa*, the parties entered into a settlement agreement. The order dismissing the case noted that the "action is dismissed with prejudice and without costs to any party, except as set forth in the settlement agreement." *Id.* at 39-40. Following *Kokkonen*, the Second Circuit held that neither the reference to the settlement agreement nor the ambiguous phrase in the dismissal order stating "except as set forth in the settlement agreement" were sufficient for the court to retain jurisdiction to hear the motion to enforce the settlement agreement. *Id.* at 41. As the Second Circuit explained, "most importantly, the dismissal order neither expressly retains jurisdiction over the agreement nor incorporates its terms." *Id.*

Similarly, every other circuit which has considered the fundamental jurisdictional issue presented here has held that the proponent of jurisdiction must demonstrate that the district court has jurisdiction under the principles of ancillary jurisdiction as defined in *Kokkonen*. *In Re: Phar-Mor, Inc. Sec. Litig.*, 172 F.3d at 275; *Nat'l Presto*

Indus. v. Dazey Corp., 107 F.3d 1576, 1583 (Fed. Cir. 1997); *Miener v. Missouri Dep't of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995); *Lucille v. City of Chicago*, 31 F.3d 546, 548-49 (7th Cir. 1994); *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995).

The decision in this case is in direct conflict with each of the cited circuit court decisions. Indeed, the court below recognized that its decision was in conflict with those in other circuits. *Re/Max Int'l*, 271 F.3d at 644. After discussing the decision of the Second Circuit in *Scelsa*, described above, and that of the Ninth Circuit in *Hagestad*, cited above, the court stated "[n]eedless to say, these decisions are not binding on our Circuit." *Id.* The court below thus acknowledged that its decision created a split in the circuits.

III. The Opinion Below Is In Direct Conflict With Earlier Decisions Of The Sixth Circuit.

As Judge Wallace notes in his dissent, and as the court below virtually admits, the decision is this case is in direct conflict with two recent decisions of the Sixth Circuit. *Re/Max*, 271 F.3d at 651 (Wallace, J., dissenting); *see McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000); *Caudill v. N. Am. Media Corp.*, 200 F.3d 914 (6th Cir. 2000).

McAlpin is representative of the reasoning and holdings of these two decisions. In that case, the district court did not expressly reserve jurisdiction to enforce the settlement agreement or incorporate the settlement agreement in the dismissal order. *McAlpin*, 229 F.2d at 502.

After citing *Scelsa*, the *McAlpin* court held that the district court did not have jurisdiction to enforce the settlement agreement:

> [b]ecause this court has joined other circuits in strictly applying *Kokkonen*'s relatively narrow interpretation of a district court's ancillary jurisdiction to enforce settlement agreements terminating litigation, the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement.

Id.; *accord Caudill*, 200 F.3d at 917.

In this case the lower court dismissed *McAlpin* and *Caudill* as "dicta" and later suggested that *McAlpin* was wrongly decided. *Re/Max Int'l*, 271 F.3d at 643. The court's claim that those decisions are dicta is based on the theory that there is a distinction between the "incorporation" exception of *Kokkonen* on which those opinions are based and the "reservation of jurisdiction" exception at issue here. *Id.* No explanation was offered for the claimed distinction. *Id.* at 651 (Wallace, J., dissenting).

The court went on to suggest that *McAlpin* had misconstrued *Kokkonen* and, citing *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) for the proposition that "federal courts have inherent powers to enforce agreements executed in settlement," concluded that "this Court has not historically adopted such a narrow construction of a district court's jurisdiction." *Id.* at 645. Since *Aro Corp.'s* "inherent powers" theory of jurisdiction

was rejected by *Kokkonen*, *McAlpin*, and *Caudill*, the decision in this case is not only contrary to *Kokkonen* but also those decisions from the Sixth Circuit.

IV. The Decision Below Is Erroneous.

The decision below is erroneous. It disregarded long established principles of, and limitations on, federal jurisdiction and impermissibly extends the jurisdiction of the district courts by judicial decision.

The principles on which *Kokkonen* is based are not novel. The concept that federal courts are courts of limited jurisdiction for which matters are to be presumed outside their authority, and that the proponent of federal jurisdiction must establish that a matter is within the court's jurisdiction is a long established principle of, and limitation on, the jurisdiction of the federal courts. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Turner v. President, Directors and Co. of the Bank of N. Am.*, 4 U.S. (4 Dallas) 8, 11 (1799). Equally well established is the doctrine of ancillary jurisdiction under which federal courts can hear matters sufficiently related to a pending claim as well as those necessary for the district court to vindicate its orders and judgments. *See United Mine Workers of Am. v. Gibb*, 383 U.S. 715, 725 (1966); *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926); *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1868); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

Prior to *Kokkonen*, there was a split among the lower courts concerning the jurisdiction of the district court to hear a post dismissal with prejudice motion to enforce a

settlement agreement. Some courts held that the district court had the "inherent authority" to hear such a motion when the agreement arose from a case settled in that court. *Wilkinson v. FBI*, 922 F.2d 555, 557 (9th Cir. 1991) (opinion joined by Judge Wallace who dissented in this case); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (finding that the trial court has "inherent power"); *Dankese v. Defense Logistics Agency*, 693 F.2d 13, 16 (1st Cir. 1982) (stating that the "trial court retains an inherent power"). Other courts rejected the "inherent power" theory, requiring the showing subsequently mandated by *Kokkonen*. *Langley v. Jackson State Univ.*, 14 F.3d 1070, 1074 (5th Cir. 1994) (holding that after dismissal with prejudice and absent incorporation of the agreement or a specific reservation of jurisdiction, an independent jurisdictional base is required); *Fairfax Countywide Citizens Ass'n v. County of Fairfax*, 571 F.2d 1299, 1304 (4th Cir. 1978) (holding that "the inherent power of a district court to enforce settlement agreements, like any other power . . . presupposes the existence of federal jurisdiction over the case or controversy"). This Court resolved that split in *Kokkonen*, delimiting the district court's jurisdiction in such instances to the power necessary to protect its judgments based on the doctrine of ancillary jurisdiction and rejected the theory of "inherent power."

The circuit court here ignored these fundamental principles. First, the decision of the circuit court below begins from the wrong premise, failing to even mention the fact that federal courts are courts of limited jurisdiction and that a proponent of that jurisdiction must demonstrate that a claim falls within it. *See Re/Max Int'l*, 271 F.3d at 651 (Wallace, J., dissenting).

Second, the circuit court ignored the principles and limitations of ancillary jurisdiction on which *Kokkonen* is based. Rather than discussing those principles, or the inherent limitations of federal jurisdiction, the circuit court dismissed its own precedent, which faithfully followed *Kokkonen*, as too narrow and misguided:

> we do not believe that *Kokkonen* requires the interpretation mentioned in *McAlpin*. While *McAlpin* purports to quote the words of Justice Scalia, the phrase "expressly retained jurisdiction" does not appear in the Supreme Court's decision in *Kokkonen*.

Id. at 643. This claim is the predicate to the conclusion that a "magic form of words" is not required – a supposition which ignores the holding of *Kokkonen*. As this Court stated in *Kokkonen*:

> [b]ut the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made a part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by a provision incorporating the terms of the settlement agreement in the order.

Kokkonen, 511 U.S. at 380-81 (quoted in *McAlpin*, 229 F.3d at 501). Indeed, *McAlpin* correctly recognized that *Kokkonen* and principles of ancillary jurisdiction require that the dismissal order contain plain, unambiguous words reserving jurisdiction or incorporating the settlement agreement so the motion to enforce can be fairly viewed

as one on the judgment or order. *McAlpin*, 229 F.3d at 503. The jurisdiction of the district courts should not hinge on vague words, unexpressed intent or incorrect theories of "inherent authority." *Kokkonen*, 511 U.S. at 381-382.

Third, the circuit court below relied on decisions which are inapposite and/or no longer valid. For example, the court cited *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994) and *Ford v. Neese*, 119 F.3d 560, 561-62 (7th Cir. 1997) for the proposition that a district court has the authority to hear a post dismissal motion to enforce if the dismissal order gives the party the right to reopen the judgment. *Re/Max Int'l*, 271 F.3d at 643-44. Yet the dismissal orders in each of those cases were without prejudice and reserved the right to hear the type of motion later brought before the court. *Bell*, 36 F.3d at 448; *Ford*, 119 F.3d at 562. Similarly, the court's apparent reliance on *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985), despite its admission that the "circular logic" in *McCall-Bey* "may not survive *Kokkonen*" is clearly misplaced. *Re/Max Int'l*, 271 F.3d at 643. The circuit which decided *McCall-Bey* stated that in view of *Kokkonen* the *McCall-Bey* decision is of questionable validity. *In Re: Bond*, 254 F.3d 669, 676, n.4 (7th Cir. 2001).

Finally, the court's effort to distinguish *Kokkonen*, *McAlpin* and *Caudill* is based on a misconstruction of the record and only serves to highlight the erroneous nature of the ruling below. The circuit court's claim that *Kokkonen* and its progeny are distinguishable because each of those cases was dismissed under Federal Civil Rule 41(a)(1) (dismissal on stipulation of the parties) rather than Rule 41(a)(2) (dismissal on motion of plaintiff and such terms as the court deems appropriate), which it

claims was the basis for the dismissal of this case, is simply incorrect. *Re/Max Int'l*, 271 F.3d at 644 (footnote omitted). Not only did the court fail to explain the reason this distinction is important – and it is not – but neither the transcript from July 13th nor the July 14th dismissal order cite any provision of the Federal Rules. There is no motion in the record by the plaintiffs as required by Rule 41(a)(2). Indeed, Re/Max acknowledged in its brief to the circuit court that it had not filed such a motion or requested a Rule 41(a)(2) dismissal. App., *infra*, at 79a.

Rather, the dismissal order could only have been entered under Rule 41(a)(1) which provides for dismissal on stipulation of the parties. That stipulation is in the settlement agreement of the parties in the transcript of July 13th and states that the case is to be dismissed with prejudice. App., *infra*, at 70a. Indeed, the July 14th dismissal order cites the July 13th settlement agreement as its predicate. App., *infra*, at 67a.

Finally, neither the July 13th Settlement of the parties in this case, as reflected in the transcript, nor Rule 41(a)(1) provide that the court can condition the dismissal on a retention of jurisdiction. *Cf. Kokkonen*, 511 U.S. at 381-82 (noting that Rule 41(a)(1) does not provide that the court can add conditions to the dismissal). Thus, whatever the meaning of the last sentence in the dismissal order of July 14th, it is clear that it does not transform a claim concerning an alleged breach of an agreement to agree on more formal settlement papers into an action based on a court order – the predicate under *Kokkonen* for ancillary jurisdiction here. An ambiguous sentence in a dismissal order added without the authority of the parties or the Civil Rules is clearly not a basis for the

expansion of federal jurisdiction. The decision of the circuit court is erroneous.

V. The Question Presented Is Important.

The question presented is important, extending far beyond this case and poses three key points, each of which is significant. First, central to the resolution of this case is the constitutional limitations on the jurisdiction of the federal courts. Under the Constitution, federal courts have limited jurisdiction with all other matters being left to the state courts. U.S. CONST. art. III, § 2 cl. 1; U.S. CONST. Amend. X; *see also Alden v. Maine*, 527 U.S. 706, 739 (1999) (noting that the "Federal Government . . . 'can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.' ") (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816)); The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961) (holding that "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"). The question presented here is whether the court below can in fact extend the judicial power of the federal courts beyond the limits set by the Constitution and Congress to adjudicate matters it deems appropriate, such as the issue of state contract law presented below. The resolution of this issue has import and implications far beyond this case.

Second, the question presented involves the authoritative nature of this Court's decisions and whether the

lower federal courts must adhere to them. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[w]e reaffirm that '[i]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions' ") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). The lower court's opinion establishes a precedent which is directly contrary to this Court's holding in *Kokkonen*, as well as the long established principles of and limits on federal jurisdiction set forth in the Constitution and decisions of this Court which presaged *Kokkonen*. By ignoring this Court's decision in *Kokkonen*, and the decisions and principles on which it is based, the court below eroded the authority of this Court and seriously undermined important constitutional and jurisdictional principles. The resolution of this question is thus important to the administration of the federal courts.

Third, absent review by this Court the lower circuit courts will again be split on an important question of federal jurisdiction. Prior to *Kokkonen* there was a division among the lower courts over the limitations of federal judicial power to resolve a motion to enforce a settlement agreement emanating from a dismissed federal law suit. As noted earlier, some courts suggested that they had the "inherent authority" to hear such matters while others held that the district court's jurisdiction was limited in a fashion not inconsistent with the principles in *Kokkonen*. Absent a resolution of this case by this Court, the decision below returns the federal courts to the sharp division over the proper demarcation of federal and state judicial power which previously existed.

The significance of the potential split among the courts on this critical jurisdictional issue is illustrated by the opinions below. Here the district court extended its jurisdiction so it could act as a settlement contract drafter, selecting and cobbling together provisions, definitions and terms to form a new agreement it deemed appropriate from incomplete drafts tendered by disputing parties. Whatever the proper role of the federal courts, one point is clear: the district court is not a drafter of settlement contracts. Indeed, if the district court had the authority to impose settlement agreements it deems appropriate – and it does not – parties would be reluctant to engage in settlement discussions with the court for fear that the court would do what was done here: impose a new and different agreement by judicial fiat. That eventuality would undermine the salutary role of those courts in the settlement process which is critical to managing overloaded dockets. Thus, left unreviewed, the decision below may discourage settlement and will serve as precedent for other courts to author further extensions of their jurisdiction in contravention of established constitutional principles and the decisions of this Court.

In sum, this case provides this Court with a rare opportunity to review and resolve three important matters at once: (1) federal jurisdiction and its limits; (2) the authority of this Court's pronouncements and their impact on the lower courts; and (3) the opportunity to resolve a split among the lower federal courts and thereby avoid the incursion of those courts into areas

reserved for the state courts. The question presented here is thus of importance extending far beyond this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2002

RE/MAX INTERNATIONAL, INC., et al., Plaintiffs-Appellees, RE/MAX NORTHEAST OHIO LIMITED PARTNERSHIP, et al., Intervenors-Appellees, v. REALTY ONE, INC., Defendant-Appellant, SMYTHE, CRAMER COMPANY, Defendant.

No. 00-4235

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

271 F.3d 633; 2001 U.S. App. LEXIS 24190; 2001 FED App. 0397P (6th Cir.); 2001-2 Trade Cas. (CCH) P73,481

July 31, 2001, Argued

November 9, 2001, Decided

November 9, 2001, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 94-00062. James S. Gwin, District Judge.

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1999 U.S. App. LEXIS 6090 (6th Cir. Ohio 1999)

DISPOSITION:

Affirmed.

COUNSEL:

ARGUED: Thomas O. Gorman, PORTER, WRIGHT, MORRIS & ARTHUR, Washington, D.C., for Appellant.

Daniel H. Bromberg, JONES, DAY, REAVIS & POGUE, Washington, D.C., for Appellees.

ON BRIEF: Thomas O. Gorman, PORTER, WRIGHT, MORRIS & ARTHUR, Washington, D.C., Hugh E. McKay,

Gina L. Schaecher, PORTER, WRIGHT, MORRIS & ARTHUR, Cleveland, Ohio, for Appellant.

Daniel H. Bromberg, JONES, DAY, REAVIS & POGUE, Washington, D.C., Mark J. Andreini, Stephen J. Squeri, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, Edward W. Cochran, COCHRAN & COCHRAN, Shaker Heights, Ohio, Terrence R. Quinn, Day & Barker, Rapid City, South Dakota, for Appellees.

JUDGES:
Before: CLAY, GILMAN and WALLACE, Circuit Judges.*
CLAY, J., delivered the opinion of the court, in which GILMAN, J., joined. WALLACE, J., delivered a separate dissenting opinion.

OPINION BY:
CLAY

OPINION:

CLAY, Circuit Judge. Defendant, Realty One, Inc. ("Realty One"), appeals the district court's summary enforcement of a settlement agreement in this antitrust action instituted by rival northeast Ohio real estate brokerage firm RE/MAX International, Inc ("RE/MAX"). After the parties reached a settlement agreement, the district court dismissed the case with prejudice without incorporating the terms of the agreement into its order or explicitly stating that it was retaining jurisdiction to enforce those terms. On appeal, Realty One challenges the district court's jurisdiction to enforce the settlement

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* The Honorable J. Clifford Wallace, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

agreement. Realty One also contends that even assuming the district court had jurisdiction to enforce the settlement agreement, it abused its discretion by not limiting its order to the terms in the transcript of the settlement proceedings. For the reasons that follow, we **AFFIRM** the district court's judgment.

BACKGROUND

A. Initial Proceedings

RE/MAX is a franchisor of a real-estate brokerage system which it sells to franchisees across the nation, including northeast Ohio. Intervenor RE/MAX Northeast Ohio Limited Partnership is the RE/MAX subfranchisor for the northeast Ohio region, which consists of Cleveland and the surrounding area. Defendants Realty One and Smythe, Cramer Company ("Smythe, Cramer") are the largest real estate brokerage companies in northeast Ohio in terms of market share. RE/MAX filed suit against Realty One and Smythe, Cramer in the United States District Court for the Northern District of Ohio, alleging that their practice of paying brokers associated with RE/MAX's franchisees lower commissions on split commission transactions violated the Sherman Antitrust Act and analogous state laws. This practice was known as an "adverse split" and was allegedly designed to drive RE/MAX out of business in northern Ohio by deterring its agents from doing business there.[1] The case was initially

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[1] The standard practice in the real-estate industry is that commissions are split equally when one broker brings the seller and another broker brings the buyer to a transaction. However,

assigned to District Judge David Dowd, who granted Defendants' motions for summary judgment as to some of RE/MAX's claims. *See RE/MAX Int'l Inc. v. Realty One, Inc.*, 924 F. Supp. 1474 (N.D. Ohio 1996). RE/MAX appealed and Realty One cross-appealed. We reversed in part and remanded for further proceedings. *See RE/MAX Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999).

The case proceeded to trial on April 10, 2000. Judge Dowd bifurcated the trial. After the presentation of the evidence, Judge Dowd instructed the jury to first decide whether Defendants had entered an agreement to issue adverse splits, which was an essential element of RE/MAX's federal antitrust claim. Following deliberations, the jury returned a verdict finding that Realty One and Smythe, Cramer had illegally agreed to restrain trade. Judge Dowd then instructed the jury to consider additional elements of RE/MAX's claims. During deliberations on these issues, the jurors posed a question that suggested they had misunderstood Judge Dowd's instructions regarding their earlier deliberations. Finding that the earlier misunderstanding could not be corrected, Judge Dowd declared a mistrial on June 26, 2000. On that same day, the case was transferred to District Judge James Gwin's docket and a new trial was scheduled for August 7, 2000. Settlement negotiations commenced shortly thereafter.

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beginning in 1987, Realty One and Smythe, Cramer began notifying RE/MAX brokerages that there would be an adverse split of 70/30 or 75/25, in favor of the defendants, whenever a RE/MAX agent was on the other side of the table from a Realty One or Smythe, Cramer agent.

B. Settlement Negotiations

On June 29, 2000, Judge Gwin appointed Judge Dowd to mediate settlement discussions with the parties. After Judge Dowd's efforts to mediate the dispute proved unsuccessful, Judge Gwin conducted mediation sessions with the parties on July 11, 12, and 13, 2000. The settlement discussions focused on two areas – a multi-million dollar monetary settlement and limitations regarding future commission-splitting and related matters. After many hours of negotiations, the parties significantly narrowed their gap with regard to a monetary settlement. The parties then shifted their focus to the issues associated with their future commission-splitting relationship. On July 13, 2000, RE/MAX and Smythe, Cramer reached a comprehensive settlement agreement. Judge Gwin asked RE/MAX and Smythe, Cramer to state the general terms of their agreement on the record. The parties did so, and stated their understanding, confirmed by the court on the record, that they would complete a written settlement agreement within forty-five days.

At the time the RE/MAX-Smythe, Cramer settlement was reached, Realty One had refused to settle with RE/MAX and indicated that it was prepared to go to trial.[2]

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[2] The district court noted its belief as to why Realty One failed to settle earlier:

> Within itself, Defendant Realty One appeared to have different interests. These different interests impaired Realty One's willingness to settle.
>
> After summary judgment had been given but before the Sixth Circuit had reversed Judge Dowd's grant of summary judgment, the former owners of

In particular, Realty One would not agree to the same limitations upon future conduct to which Smythe, Cramer had agreed. However, as RE/MAX and Smythe, Cramer

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Realty One sold their interest in Realty One to Insignia Financial Group, Inc. As part of their sales agreement for Realty One, the former owners agreed to indemnify Realty One for expenses and any judgment associated with this case. After the Sixth Circuit reversed the grant of summary judgment, these former owners became contractually obligated to defend and indemnify Realty One for expenses and any judgment in this case. Because of this contractual obligation, these former owners have already indemnified many millions of dollars of expenses and fees including expenses and fees generated in the first trial that had lasted more than ten weeks.

In seeking to settle Plaintiff RE/MAX's claims against Defendant Realty One, the former owners were able to reach an agreement in principal [sic] for financial payments sufficient to satisfy Plaintiff RE/MAX. As to such financial payments on behalf [sic] Realty One, Insignia Financial Group, Inc. refused to make any contribution. Insignia Financial Group refused contribution even though some argument existed that the former owners' duty to indemnify and defend only extended to claims arising during their tenure, not to claims or damages arising during Insignia's ownership.

Although the former owners of Defendant Realty One offered sufficient monies to settle Plaintiff RE/MAX's claim, the current management of Realty One refused to agree to the same limitations on conduct agreed to by Defendant Smythe Cramer. Of course, Smythe Cramer was paying its own expenses and would be risking its own assets if it proceeded to trial. In contrast, the current owner of Realty One, Insignia Financial Group, Inc. seemed willing to spend the

confirmed their agreement on the record, Realty One's counsel unexpectedly stated that he desired a settlement on the same terms as Smythe, Cramer, except that Realty One would pay nearly twice as much in the settlement.[3]

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former owner's monies on expenses and risk the former owner's assets to respond to any potential judgment.

(J.A. at 199 n.3.)

[3] As the proceedings continued, Realty One's Counsel, Thomas Gorman, suddenly decided to settle the matter:

> THE COURT: I look at my calendar, as against Realty One we are going to start it [the jury trial] on [August 7, 2000].
>
> MR. GORMAN: As to Realty One, we are in agreement to the financial terms we discussed earlier, same terms to the financial arrangement we discussed earlier. I don't know the number.
>
> MR. QUINN: So you are agreeing now to settle?
>
> MR. GORMAN: Yes.
>
> MR. QUINN: Same terms?
>
> MR. GORMAN: Same terms.
>
> MR. QUINN: 10 million – No, that's the total. $6,666,666.
>
> MR. GORMAN: $6,666,666 is for Realty One.
>
> THE COURT: Just to be clear, under the same terms, Mr. Gorman, with the exception being that Realty One would pay the sum of $ 6,666,666.
>
> MR. GORMAN: Yes, your Honor, Realty One would pay that sum coming from, as mentioned earlier, the two Avenis, Joe Aveni and Vince Aveni and Jim Miller [the former owners] on behalf of Realty One. And we adopt the same terms and *will draft the papers in the same time period.*

(J.A. at 1758-59 (emphasis added).) The district court noted that "with its change of face and speedy retreat

The next day, the district court entered an order dismissing the action with prejudice pursuant to Federal Rule of Civil Procedure Rule 41(a)(2).

C. Post-Settlement Activities

In the days that followed, Realty One issued a press release indicating that the "final details of the settlement . . . [were] being conducted by attorneys for the various parties." (J.A. at 1025.) Realty One also circulated a newsletter to its employees which stated "[Realty One has] reached an agreement, in principle, to settle our long-running lawsuit with RE/MAX. Though the details are still being finalized, the definitive agreement is expected by the end of August." (J.A. at 1025.) Over the course of the next month and a half, the parties engaged in continued talks, but failed to prepare a draft of the final agreement.

First, RE/MAX sent a draft of a written agreement to Realty One on July 25, 2000. Realty One did not respond to RE/MAX's draft for over three weeks. On August 17, 2000, Realty One informed RE/MAX that it was "not necessary to prepare any additional documentation concerning the settlement" because "the transcript dictated by Judge Gwin and agreed to by counsel and the parties in court on July 13, 2000, is the complete settlement of the parties." (J.A. at 1810). Realty One also claimed that

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from its professed willingness to allow a jury to decide its liability, Defendant Realty One agreed to pay much more than the amount agreed upon by Defendant Smythe Cramer." (J.A. at 199-200.)

RE/MAX's proposed draft contained "additional terms and provisions" not included in the July 13, 2000 settlement. Yet, Realty One failed to identify the allegedly different terms despite repeated requests to do so.

On August 24, Realty One's counsel sent a letter to RE/MAX's counsel which stated,

> The July 13 agreement does not require any additional written agreement (except the . . . [written] releases). However, as I indicated in our [August 17th] conversation, if plaintiffs believe that it may be useful to incorporate the terms of the agreement as dictated by Judge Gwin in a separate document we are willing to discuss preparing such a document.

(J.A. at 1812.)

RE/MAX responded the next day by again asking Realty One to identify the specific terms it found objectionable by providing a "black-lined" verison of the agreement, which Realty One failed to do. Instead, on August 28, the deadline for preparing a written agreement imposed by the district court, Realty One's counsel again wrote RE/MAX's counsel to reiterate his view of the terms of the settlement agreement:

> There is no need for any additional agreements as I have repeatedly stated to you. Your view that the July 13 agreement requires that the parties write an additional settlement agreement is not supported by the transcript. In dictating the terms of the agreement the court did not specifically state that the parties would negotiate and execute an additional agreement. Rather, the references to the preparation of papers, and the forty five day designation for doing so, refers to

> the preparation of the letters to withdraw the *special notices* and the releases plaintiffs are to furnish defendants."

(J.A. at 1816 (emphasis added).) Realty One further indicated that it was willing to execute a memorial agreement "which contains the terms of the July 13th agreement (an act which is clearly unnecessary in our view)," but was unwilling to execute a document that significantly varied from that agreement. (J.A. at 1816.) However, Realty One did not prepare or forward any draft at that time. That same day, Realty One tendered a payment in the amount of $ 3,666,666 to RE/MAX; however, RE/MAX did not accept the payment. In addition, Realty One sent a letter to existing RE/MAX franchisees withdrawing "any and all *special notices*" previously issued by Realty One. (J.A. at 1819 (emphasis added).) RE/MAX's counsel expressed his frustration with Realty One in a letter later the same day:

> We continue to have a huge disagreement in what the Court contemplated by the dictated terms of the July 13th transcript.
>
> . . . Frankly, in thirty years of practice I have never settled a case where there was not some type of a settlement agreement reached. I have always dictated the rough settlement into the record so that there is no misunderstanding as to the terms of the settlement agreement, but I've always understood those terms would have to be reduced to writing so that there is no misunderstanding in the future and so that the parties can avoid the potential for future litigation.

> Also, you indicate that you want us to furnish you with the appropriate releases. Once again, I remind you that the releases were contained in the proposed settlement agreement that was sent to you over a month ago. To date, we have never heard one word indicating what is objectionable within that agreement other than the fact that Realty One continues to indicate that the agreement contains terms which are not in the July 13th agreement. Specifically, I continue to ask you to tell us what terms you are referring to.
>
> Finally, you ask whether or not we still wanted you to "red-line" the agreement to eliminate the terms which have been "added" to the July 13th agreement. Yes, we have been asking Realty One to do this for a month. It was not until last week that I learned that Realty One was insistent on not signing a formal settlement agreement.
>
> . . .
>
> We have no alternative but to request a conference with Judge Gwin.

(J.A. at 1822.)

RE/MAX requested a status conference once it became clear that the district court's deadline for drafting a final agreement would not be met. In response, Realty One identified some of the terms it considered to be unwarranted or outside the contemplation of the parties. Two of Realty One's specific concerns were security promises the RE/MAX draft imposed on Realty One's parent entity and former owners as well as the requirement of quarterly payments with compounded interest.

Significantly, neither of these provision was included in the district court's order which is the subject of the instant appeal. On Friday, September 1, 2000, Judge Gwin conducted an off-the-record conference call with the parties during which he instructed them to continue negotiating over the Labor Day weekend. He further instructed that a motion to enforce should be filed by 4:00 p.m. on the Tuesday after Labor Day if the parties had not reached an agreement by that time. Later on the same day, RE/MAX sent a letter to Realty One accommodating some of its stated objections and asking whether Realty One had additional objections. That evening, Realty One informed RE/MAX that it had "difficulties" with that draft, but failed to specify those problems.

On the evening of Monday, September 4, 2000, Realty One sent RE/MAX a list of nearly two dozen of its concerns. Realty One also proposed its own draft of the agreement, which had a cover letter attached reading, in part, "We have prepared a draft agreement in accordance with the July 13, 2000 transcript since the provisions in your earlier draft far exceeded the terms agreed to." (J.A. at 1063.) RE/MAX objected to this draft, arguing that it narrowed the meaning of key terms. Ironically, Realty One's proposed agreement, while purporting to be limited to the terms of the July 13th transcript as RE/MAX's agreement had allegedly failed to do, was actually longer than RE/MAX's draft.

On September 5, 2000, RE/MAX filed a motion to enforce the settlement agreement. Realty One opposed this motion on the basis that the district court lacked jurisdiction. Realty One also alleged that it had already satisfied the terms of the July 13th agreement. Neither

party requested an evidentiary hearing. Judge Gwin entered an order enforcing the motion on September 14, 2000.

DISCUSSION

I. JURISDICTION TO ENFORCE SETTLEMENT AGREEMENT

This court reviews a district court's decision regarding subject matter jurisdiction *de novo*. *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000). The party seeking to invoke the subject matter jurisdiction of the district court bears the burden of showing that the matter is properly before that court. *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)).

Realty One contends on appeal that the district court lacked subject matter jurisdiction to enforce the settlement agreement because the language of its order of dismissal was unconditional We disagree. The order of dismissal in the case at bar read, in full:

> Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000 – July 13, 2000. During said conferences, settlement talks took place. After a diligent effort on all sides, the parties have settled this[.] Therefore,
>
> IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice".
>
> FURTHER, Any subsequent order setting forth different terms and conditions relative to the

> settlement and dismissal of the within action shall supersede the within order.

(Order of Dismissal, J.A. at 693.)

In *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994), the Supreme Court considered a district court's attempt to enforce a settlement agreement between parties in a diversity action. The parties had settled and filed a stipulation of dismissal with prejudice pursuant to Fed. R. Civ. Pro. 41(a)(1)(ii), which the district court judge then signed.[4] Writing for a unanimous Court, Justice Scalia explained that as courts of limited jurisdiction, federal district courts do not possess the inherent power to vindicate their own authority where parties enter into a voluntary agreement resolving their federal lawsuit. 511 U.S. at 376-77. Instead, "enforcement of the settlement agreement, whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own

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[4] That rule provides:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Fed. R. Civ. P. 41(a)(1)(ii).

basis for jurisdiction." 511 U.S. at 378. However, a district court does have the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement. *Futernick v. Sumpter Township*, 207 F.3d 305, 310 (6th Cir. 2000). The *Kokkonen* Court noted that such ancillary jurisdiction would have existed if the parties had provided for the court's enforcement of a dismissal-producing settlement agreement through either one of two methods:

> The only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal – either by separate provision (*such as a provision "retaining jurisdiction"* over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a breach of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

Kokkonen, 511 U.S. at 381 (emphasis added).

We first considered the requirements for satisfying the second *Kokkonen* exception in *Caudill v. N. Am. Media Corp.*, 200 F.3d 914 (6th Cir. 2000).[5] Following the

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[5] In *Caudill*, we were presented with a dismissal order which stated:

> In the presence of and with the assistance of counsel, the parties placed a settlement agreement on the record before the Hon. Bernard Friedman on October

decisions of the Third and Eighth Circuits on this issue in *In re Phar-Mor, Inc. Securities Litigation*, 172 F.3d 270 (3d Cir. 1999), and *Miener v. Missouri Department of Mental Health*, 62 F.3d 1126 (8th Cir. 1995), we held that "the phrase 'pursuant to the terms of the settlement' fails to incorporate the terms of the settlement agreement into the order because '[a] dismissal order's mere reference to the fact of settlement does not incorporate the settlement agreement in the dismissal order.' " *Caudill*, 200 F.3d at 917 (citations omitted). In *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000), we similarly held that the mere reference in a dismissal order to a settlement agreement does not incorporate the settlement agreement into the order.[6]

1, 1991. Pursuant to the terms of the parties' October 1, 1991 settlement agreement, the Court hereby DISMISSES this case.

IT IS SO ORDERED.

Caudill v. N. Am. Media Corp., 200 F.3d 914, 915 n.1 (6th Cir. 2000).

[6] In *McAlpin*, the stipulation of dismissal provided,

> The parties being in agreement and the Court being otherwise sufficiently advised that the parties hereto have settled their disputes,. . . . the Court hereby orders:
>
> 1. That the Complaint filed herein is DISMISSED AS SETTLED WITH PREJUDICE AS TO ALL CLAIMS asserted therein and this action is Ordered stricken from the docket of this Court in its entirety.
>
> 2. That this Court's Order of August 29, 1997, is hereby amended to provide that Count II of the Complaint is Dismissed with Prejudice.

Inasmuch as the district court's order of dismissal in the instant case merely made reference to "settlement talks" and failed to incorporate the terms of the settlement agreement, it is clear that the second *Kokkonen* exception has not been satisfied. However, in considering RE/MAX's motion to enforce, the district court found that through the language of its order, it had retained jurisdiction to enforce matters concerning the settlement agreement in satisfaction of the first *Kokkonen* exception.

Realty One argues that under this Court's opinion in *McAlpin*, the district court's language was not sufficiently explicit. Realty One points to this Court's statement in *McAlpin* that under *Kokkonen* "a federal district court lacks jurisdiction to enforce a settlement agreement terminating litigation unless the court ***'expressly retained jurisdiction*** to enforce the settlement agreement' or 'incorporated the terms of the settlement into the dismissal order.' " *McAlpin*, 229 F.3d at 501 (emphasis added). In *McAlpin*, we noted that this Court has "joined other circuits in strictly applying *Kokkonen's* relatively narrow interpretation of a district court's ancillary jurisdiction to enforce settlement agreements terminating litigation." *Id.* at 502. However, we did not have occasion to construe the first *Kokkonen* exception in that case.

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3. That the Court appointed Receiver, Morris Gahafer, is hereby ordered to turn over to the Defendants any and all copies of the Receiver's First Interim Report as well as any drafts thereof or any other documents which he may have obtained or generated as a result of the performance of his duties as Receiver herein.

McAlpin v. Lexington 76 Auto Truck Stop, Inc., 229 F.3d 491, 497 (6th Cir. 2000).

Instead, the holding in *McAlpin* was limited to holding that "the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement." *Id.* Insofar as the first *Kokkonen* exception was not the basis for our decision in *McAlpin*, the language to which Realty One points is dicta and therefore not binding on this Court.[7]

Moreover, we do not believe that *Kokkonen* requires the interpretation mentioned in *McAlpin*. While *McAlpin* purports to quote the words of Justice Scalia, the phrase "expressly retained jurisdiction" does not appear in the Supreme Court's decision in *Kokkonen*. Instead, *Kokkonen* only requires a reasonable indication that the court has retained jurisdiction, "*such as* a provision 'retaining jurisdiction' over the settlement agreement." *Kokkonen*, 511 U.S. at 381 (emphasis added). In this way, the Court intended to avoid subjective interpretations of what a district court intended to accomplish through its order of dismissal – a practice employed by appellate courts in cases such as *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985).[8] However, while the circular logic used in *McCall-*

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[7] The same may be said of our decision in *Caudill*, which was decided a few months earlier. *See Caudill*, 200 F.3d at 915; *see also In re Phar-Mor, Inc. Secs. Litig.*, 172 F.3d 270, 273 (3d Cir. 1999) (holding that no jurisdiction existed after an order dismissed the case with prejudice "*pursuant to the terms of the Settlement* . . . "). The dismissal orders in those cases contained no language which could be construed as retaining jurisdiction.

[8] In *McCall*, the court reasoned:

> The judge would not have been likely to grant such a petition in a case over which he had no jurisdiction

Bey may not survive *Kokkonen*, the tradition of not requiring the use of specific terminology remains. *See id.* at 1188 (rejecting the notion that "there is any magic form of words that the judge must intone in order to make the retention of jurisdiction effective.").

In post-*Kokkonen* decisions, appellate courts have adhered to this view. For example, in *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994), the Fifth Circuit held that the district court had properly retained jurisdiction by including language in its dismissal order that gave the parties the right to reopen the judgment if a settlement was not consummated within sixty days.[9] Also, in *Ford v.*

> because he had dismissed the case outright months earlier. His response is therefore some evidence that he had indeed intended to make his dismissal, though outright in form, conditional in substance; that in referring to the as yet unfiled stipulation in his order of dismissal, the judge, perhaps fully aware of the tenor and progress of the settlement negotiations and the provision in the settlement agreement for petitioning the court to enforce it, intended to honor that provision, and to this end decided to retain jurisdiction of the litigation for the very purpose of responding to the type of petition that the plaintiff filed. It would of course have been much better if the judge had made all this clearer, but we conclude that the plaintiff has shown – if barely – that the judge did retain jurisdiction of the case.

McCall-Bey v. Franzen, 777 F.2d 1178, 1188-89 (7th Cir. 1985).

[9] The *Bell* court explained,

> The order states that the court, "having been advised by counsel for the parties that the above action has been settled," was dismissing the case "without prejudice to the right, upon good cause shown within

Neese, 119 F.3d 560, 561-62 (7th Cir. 1997)[10], the Seventh Circuit borrowed the surviving logic of *McCall-Bey* in holding that it was apparent that the district court intended to retain jurisdiction.[11] The Seventh Circuit recently employed this logic again in *In re Bond*, 254 F.3d 669 (7th Cir. 2001).

Realty One cites post-*Kokkonen* cases from other circuits that require express language of retention. *See, e.g., Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 41 (2d Cir. 1996) (holding that under *Kokkonen*, the district court has jurisdiction only if the dismissal order expressly reserved authority to enforce the agreement, or incorporated the agreement into the order); *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995) (holding that although the court clearly intended to retain jurisdiction, an order dismissing the case with prejudice "with leave for good cause

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> sixty (60) days, to reopen it if settlement is not consummated and seek summary judgment and enforcing the compromise."

Bell v. Schexnayder, 36 F.3d 447, 448 (5th Cir. 1994).

[10] The order in *Ford* dismissed the suit "without prejudice to reinstatement in the event that the . . . payments are not made by the defendant. . . . " *Ford v. Neese*, 119 F.3d 560, 561-62 (7th Cir. 1997).

[11] It cannot be said that all of the Seventh Circuit's reasoning in *McCall-Bey* is meaningless in the wake of *Kokkonen*. Indeed, the court recognized in *McCall-Bey* that "there must be a deliberate retention of jurisdiction, as by issuing an injunction or stating that jurisdiction is retained for a particular purpose. An unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by Rule 60(b)." *See McCall-Bey*, 777 F.2d at 1190.

shown within ninety (90) days, to have the dismissal set aside and the action reinstated if the settlement is not consummated" failed to meet the *Kokkonen* standard). Needless to say, these decisions are not binding on our Circuit. In addition, we believe these cases are distinguishable. As was true in *Kokkonen*, *McAlpin* and *Caudill*, many of these cases involved stipulations of dismissal prepared by the parties and ratified by the court pursuant to Fed. R. Civ. P. 41(a)(1)(ii). *See, e.g., Scelsa*, 76 F.3d at 39 (finding no jurisdiction where the district court dismissed the action with prejudice after approving an order drafted by the parties pursuant to Rule 41(a)(1)(ii), marking it "SO ORDERED."). Conversely, in the case at bar, the district court dismissed the action with prejudice in a Rule 41(a)(2) order.[12] This distinction is further evidence that *McAlpin* and *Caudill* did not settle the issue we now decide. *See Hinsdale v. Farmers Nat'l Bank & Trust*, 823 F.2d 993, 996 (6th Cir. 1987) (finding no jurisdiction where the order of dismissal with prejudice was unconditional, but

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[12] Rule 41(a)(2) provides:

> Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(a)(2).

recognizing the authority of a district court to retain jurisdiction under Fed. R. Civ. P. 41(a)(2)). Furthermore, the language of the orders in many of those cases made only vague references to the settlement agreement, thereby not even implicating the first *Kokkonen* exception that we discuss today.[13]

We also note that this Court has not historically adopted such a narrow construction of a district court's jurisdiction. *See, e.g., Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (holding that federal courts have inherent powers to enforce agreements executed in settlement). The fact that we have previously found jurisdiction in light of express statements is not indicative of a change in course. *See, e.g. Futernick*, 207 F.3d at 309 (finding jurisdiction where a district court amended its judgment "to provide for the court's retention of jurisdiction until completion of the parties' obligations under the settlement agreement"); *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1145 (6th Cir. 1997) (holding that a district court had subject matter jurisdiction to address

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[13] Similar to the dismissal orders in *McAlpin* and *Caudill*, recounted earlier in this opinion, the language of the dismissal order in *Scelsa* could in no way be construed as expressing an intent to retain jurisdiction. The *Scelsa* dismissal order provided:

> It is Hereby Stipulated and Agreed, by and between the undersigned attorneys for the parties, that the above-captioned action is dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement among the parties dated January 7, 1994.

Scelsa v. City Univ. of N.Y., 76 F.3d 37, 39-40 (2d Cir. 1996).

the state law issues because the consent decree specifically conferred jurisdiction). Simply because a mandate is exceeded is no reason to raise the bar to the same level in every circumstance.[14]

Turning to the language of Judge Gwin's order, we believe that it satisfied the second exception recognized in *Kokkonen*. The order stated that any "subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order." (J.A. at 693.) Of course, the court may only enter subsequent orders involving the settlement agreement if it has retained jurisdiction. Thus, the "continued role for the court that was contemplated after dismissal" is included in the language of the order itself. *In re Bond*, 254 F.3d at 676-77. We therefore find that this was a "separate provision" retaining jurisdiction in compliance with *Kokkonen* and hold that the district court properly asserted subject matter jurisdiction.

II. TERMS OF SUMMARY ENFORCEMENT

We now address Realty One's claim that the district court erred by enforcing terms to which Realty One had not agreed. This Court reviews for clear error the district court's factual determination that the parties had agreed to settlement terms; however, we review the district

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[14] We are likewise undeterred by the fact that Judge Gwin's subsequent order of enforcement contained the sentence "This Court shall retain continuing jurisdiction to enforce the provisions of this judgment." (J.A. at 213.) After Realty One attacked the court's jurisdiction initially, it could only be expected to take every precaution in the future.

court's decision to grant a motion to enforce the settlement based on its preliminary factual finding for an abuse of discretion. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 418 (6th Cir. 2000). We will only find an abuse of discretion only when left with the "definite and firm conviction that the court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors" or where it "improperly applies the law or uses an erroneous legal standard." *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000) (citations and internal quotation marks omitted).

A. Validity of Settlement Agreement

Before enforcing a settlement, a district court must conclude that agreement has been reached on all material terms. *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988). Ordinarily, an evidentiary hearing is required where facts material to an agreement are disputed. *Kukla v. Nat'l Distillers Prods. Co.*, 483 F.2d 619, 622 (6th Cir. 1973); *Aro Corp.*, 531 F.2d at 1372. However, no evidentiary hearing is required where an agreement is clear and unambiguous and no issue of fact is present. *Aro Corp.*, 531 F.2d at 1372. Thus, summary enforcement of a settlement agreement has been deemed appropriate where no substantial dispute exists regarding the entry into and terms of an agreement. *Kukla*, 483 F.2d at 621; *cf. Therma-Scan*, 217 F.3d at 419 (recognizing that summary proceedings may result in inequities when a dispute exists as to a material term). No evidentiary hearing was held in the instant case because neither party requested one. Indeed, none was required because the record shows that all the essential terms had been agreed upon in open court and

all that remained was to sort out the non-material details and put the agreement in writing. Realty One acknowledges that there was a clear and unambiguous agreement, constituting a meeting of the minds on key terms. In addition, Realty One admits that the fact that certain terms, such as "adverse split" and "RE/MAX business model," were left undefined at the July 13, 2000 court session does not undermine the crux of the agreement.

The existence of a valid agreement is not diminished by the fact that the parties have yet to memorialize the agreement. When parties have agreed on the essential terms of a settlement, and all that remains is to memorialize the agreement in writing, the parties are bound by the terms of the oral agreement. *Brock*, 841 F.2d at 154; *Kukla*, 483 F.2d at 621 (observing that the power of a trial court to enforce a settlement agreement has been upheld even where the agreement has not been arrived at in the presence of the court nor reduced to writing). Furthermore, the objective acts of the parties reflect that an agreement had been reached. In the first few days after the settlement was reached, Realty One communicated its belief that an agreement had been reached in a newsletter to its employees. In addition, at various points in the post-settlement talks, RE/MAX attempted to consummate the settlement by preparing a written document. Realty One also began performance of its obligations under the agreement by tendering a payment of over three million dollars and withdrawing its adverse split letters. Under Ohio law, these expressions of assent are generally sufficient to show a meeting of the minds. *See Nilavar v. Osborn*, 127 Ohio App. 3d 1, 711 N.E.2d 726, 733 (Ohio Ct. App. 1998).

B. Breach By Realty One

The district court noted in its order that Realty One had breached the agreement by failing to negotiate in good faith and agree to final terms. According to the plain language of the dialogue from July 13, 2000, Realty One adopted Smythe, Cramer's obligation to prepare a memorialized written expression of the settlement terms as well as to "handle the details" of the agreement within forty-five days.[15] Yet, Realty One argued that it never agreed to prepare any written document aside from papers withdrawing its special notice letters informing RE/MAX franchisees of its intent to engage in adverse splits. The record shows that Realty One stubbornly refused to cooperate.

Realty One now claims that it complied with the terms of the settlement agreement by tendering a payment for over three million dollars and by withdrawing

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[15] As RE/MAX and Smythe, Cramer had nearly completed recording the terms of their agreement, the RE/MAX's Chairman, Mr. Liniger, stated, "This becomes effective today *and we would just handle the details?*" (J.A. at 1756.) Shortly thereafter, Smythe, Cramer's Chairman, Lucius McKelvey, confirmed that documentation would be prepared to memorialize the parties agreement and RE/MAX's counsel, Terrence Quinn, agreed:

> MR. McKELVEY: Your Honor, is it implicit that the attorneys are thus mandated *to complete the written agreement within the 45 day time frame, right?*
>
> THE COURT: Yes.
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> MR. McKELVEY: That's a given.
>
> MR. QUINN: Sure, that's fine.

(J.A. at 1757-58.)

its special notice letters. However, it did not even make these overtures until August 28, 2000, which was the deadline for memorializing the agreed upon terms – not the deadline for payments or releases from the respective parties. Although both parties were jointly responsible for memorializing the terms within the prescribed time period, Realty One was more culpable because its acts that have frustrated the negotiation process, thereby necessitating judicial intervention. Thus, the district court correctly determined that Realty One breached the settlement agreement.

C. Language of the Enforcement Order

The district court determined that Realty One agreed to a settlement on the same terms as to future conduct that RE/MAX had agreed upon with Smythe, Cramer, except that Realty One agreed to pay much more than the amount agreed upon by Smythe, Cramer. As we have already discussed, this factual determination was not clearly erroneous. Realty One's attorney stated, and the district court judge verified, that Realty One was agreeing to the same deal that had been dictated into the record during the several minutes prior to Realty One's surprise settlement agreement. The district court's enforcement order prohibits Realty One from issuing "special notice letters" to RE/MAX brokers in the Northern District of Ohio based upon their affiliation with RE/MAX or their use of the RE/MAX business model. Realty One now claims that the terms in the district court's order are different than those to which it assented on July 13, 2000. Specifically, Realty One complains that certain terms are too broad and are the product of

subsequent negotiations and deals struck between RE/MAX and Smythe, Cramer. However, Realty One has failed to articulate any material differences between the July 13th agreement and the subsequent order of enforcement. We believe that the parties received the same basic deal to which they had already agreed.

"Special Notice Letter"

Realty One objects to the use of the term "special notice letter" in the district court's order, contending that it never agreed to use this term as a substitute for "adverse split." Realty One claims that use of the term "special notice letter" would significantly alter its obligations and would insulate RE/MAX from fair market competition. Although the settlement agreement as stated provides that Realty One will withdraw all adverse splits and issue them under limited circumstances in the future, the term was left undefined. However, Realty One has not demonstrated how inclusion of the term "special notice," as defined by the district court, yields a materially different agreement. Realty One informed RE/MAX of the adverse splits via special notice letters. The trade usage of the term "adverse split" comports with the district court's definition of "special notice letter."[16]

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[16] The district court's order defines "special notice letter" as

> a written notification by defendants to a broker in which a defendant (i) offers to compensate the addressee broker on the sale of a defendant listing by the addressee broker or any of its agents (either as buyer's agent or as subagent) at a level lower than

Moreover, the record of post-settlement correspondence between the parties shows that Realty One itself used these terms interchangeably. For example, the letters Realty One submitted to RE/MAX franchisees on August 28, 2000, allegedly in fulfillment of the requirement that it withdraw adverse splits against RE/MAX franchisees, announced that Realty One was "canceling any and all special notices sent . . . regarding the commission payable to your brokerage on the sale by your brokerage of a Realty One listing." (J.A. at 1819.) Realty One's challenge is therefore without merit.

"RE/MAX Business Model"

Realty One also contends that the district court's definition of the "RE/MAX business model" is too broad and expansive.[17] Realty One claims that the definition of this term should be limited to mean the RE/MAX 100% concept, a policy by which RE/MAX agents typically retained larger commissions than Realty One agents. However, Realty One provides no support for this

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> that offered generally by the defendant to other brokers through the listing of the property with an MLS or (ii) declines to co-broke on defendant listings.

(J.A. at 206-07.)

[17] The district court order defined "RE/MAX business model" as follows:

> RE/MAX business model" shall mean the methods of operating and developing a residential real estate brokerage office, as taught and/or promoted by RE/MAX International to new and existing franchisees.

(J.A. at 207.)

restriction. At the July settlement conference, Smythe, Cramer agreed that in addition to withdrawing all adverse splits then in effect, it would also covenant not to "impose any adverse splits *based upon the business model used by plaintiff RE/MAX or its agents*, and would do so only for reasons consistent with the imposition of adverse splits among other real estate agencies in the [North Eastern Ohio] area." (J.A. at 1756 (emphasis added).) When Realty One agreed to the same terms as Smythe, Cramer, it agreed to this provision as well. In addition, the parties' stipulations from early in the litigation imply a broader definition that Realty One now advocates.[18] We therefore find no error in the district court's definition of this term.

"North Eastern Ohio", "MLS" & "RE/MAX Brokers"

Realty One disputes the geographic area in which the agreement will be effective. Specifically, it claims that "Northeastern Ohio", or "Northeast Ohio", should be limited to the thirteen counties represented by the local real estate industry's "multiple listing services" ("MLS") – namely, the Northern Ohio Regional Multiple Listing Service ("NORMLS") and the Akron Area Multiple Listing Service ("AAMLS") – as opposed to the Northern

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[18] The first stipulation provides:

> The distinguishing characteristics of the RE/MAX system include, among other things, distinctive sales and promotional materials, centralized advertising, promotional and referral services, proprietary procedures and a 100 commission concept.

(J.A. at 316.)

District of Ohio, which includes some twenty counties. The record reveals that, on July 13th, 2000, Smythe, Cramer agreed that the restrictions would apply to "North Eastern Ohio"; the parties did not restrict this area by reference to any particular MLS. As we have explained, Realty One is also bound by this agreement. It is therefore plausible for the district court to have included the entire Northern District of Ohio, which is the area in which Realty One was allegedly engaged in anti-competitive business practices that inhibited RE/MAX's operations. The full remedy negotiated by the parties contemplated including this entire area.

In addition, Realty One's challenge to the inclusion of three listing service areas, NORMLS, AAMLS, and the Centralized Real Estate Information Service ("CIRS"), is immaterial. As RE/MAX notes, AAMLS no longer exists, and has since been replaced by CIRS. Realty One does not even begin to explain the materiality of this difference. Realty One also challenges the application of the agreement to future RE/MAX brokers, but again fails to articulate why this was in error.[19] The district court's definition

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[19] The district it [sic] court's order defines "RE/MAX Brokers" in the following manner:

> "RE/MAX Broker" shall mean any residential real estate brokerage firm (i) operating, at present or in the future, under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International (ii) in the Northeast Ohio area. Without limiting this definition, the Franchisee Plaintiffs are included within the scope of the term "RE/MAX Broker" for the periods during which they operated or operate under their respective franchise agreements. The term "RE/MAX Broker," as used

comports with the notion that Realty One adopted Smythe, Cramer's agreement to terminate its allegedly illegal business practices as to "all RE/MAX principals and agents." (J.A. at 1755.) The record contains no restriction applying only to current RE/MAX agents. Furthermore, the settlement talks focused in large part upon prospective business arrangements. Limiting the order only to current agents would defeat the clear intent of the parties in agreeing to settle by rendering the agreement impotent.

Dispute Resolution Procedure

Finally, Realty One attacks the detailed "Dispute Resolution Procedures" incorporated into the settlement order. However, it fails to object to any of the specific provisions in that dispute procedure. Instead, Realty One merely makes the blanket statement that it only agreed that an arbitrator would resolve factual disputes concerning the issuance of an adverse split by Realty One to RE/MAX. Yet, the record reveals a more detailed arbitration agreement. The district court noted on the record that

> the party and agency, RE/MAX agency, as against whom the adverse split was being imposed would have a right to contest that

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herein, shall not include any Franchisee Plaintiff or other residential real estate brokerage firm that has a court action (other than the Actions and court actions relating to property-specific or transaction-specific matters involving a buyer or seller client) now pending against Defendant Realty One.

(J.A. at 206.)

> before a disinterested arbitrator to be chosen by the parties. And the parties would both mutually agree to bear the cost of that arbitration, and both would commit to facilitating that arbitration.
>
> . . .
>
> It's further the agreement of the parties that this right to arbitrate would continue for five years, or for such period of time at which RE/MAX International and its agents reached . . . 20 percent [of the market share] in the . . . North Eastern Ohio area, whichever came first.

(J.A. at 1755-56.). Realty One has not indicated how this agreement is materially different from the mandates of the district court's order and its challenge to the dispute resolution procedures is not well-taken.

Once concluded, a settlement agreement is as binding, conclusive, and final as if it had been incorporated into a judgment. *Clinton St. Greater Bethlehem Church v. City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973). Summary enforcement of a settlement agreement for which there is no dispute as to the terms of the agreement is the only appropriate judicial response, absent proof of fraud or duress. *See, e.g., Aro Corp.*, 531 F.2d at 1372; *Kukla*, 483 F.2d at 621; *cf. Dillow v. Ashland*, 1999 U.S. App. LEXIS 20354, No. 97-6108 at **1-**2 (6th Cir. Aug. 24, 1999) (unpublished) (holding that the district court did not abuse its discretion in enforcing a settlement agreement where the plaintiff agreed on the record to the same material terms enforced by the district court). As our discussion reflects, the material terms are the same as those agreed to on July 13, 2000. Realty One has failed to

point to any material differences that would warrant a finding to the contrary. We therefore hold that the district court's enforcement order was not an abuse of its discretion.

CONCLUSION

For the foregoing reasons, the district court properly retained and exercised jurisdiction over the settlement agreement, and did not abuse its discretion in enforcing the agreement. The district court's judgment is therefore **AFFIRMED.**

DISSENT BY:

J. Clifford Wallace

DISSENT:

WALLACE, Circuit Judge, dissenting. Because I conclude that the district court did not retain jurisdiction to enforce the settlement agreement, I dissent. The appeal should be dismissed.

To retain jurisdiction to enforce a settlement agreement, a district court must either include a "separate provision [in the order of dismissal] (such as a provision 'retaining jurisdiction' over the settlement agreement) or . . . incorporate the terms of the settlement agreement in the [dismissal] order." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994). In this case, the majority argues that the district court had jurisdiction to enforce the settlement agreement because it included a provision in its order of dismissal

" 'retaining jurisdiction' over the settlement agreement." *Id.*

The order of dismissal states:

IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice."

FURTHER, any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

By its plain meaning, the order gives the court the authority to *alter* the terms of the settlement agreement not the authority to *enforce* it. If the court wanted to retain jurisdiction to *enforce* the agreement, it could easily have so stated in the order. This appears clear on the face of the order.

But to the majority, a court may exercise ancillary jurisdiction over a settlement agreement if its order of dismissal contains "some sort of indication that the court has retained jurisdiction." Thus, the majority appears to argue that a partial reservation of jurisdiction by the district court in its dismissal order really operates as a total reservation of jurisdiction. For example, apparently the majority would hold that a district court's reservation of jurisdiction in a dismissal order over a settlement agreement for ninety days is actually a reservation of jurisdiction for an indefinite period of time or that a district court's reservation of jurisdiction in a dismissal order over one provision in a settlement agreement is really a reservation of jurisdiction over the whole agreement. In other words, the district court's dismissal order

in this case does not mean what it clearly says but, instead, means what this court thinks it should have said.

I cannot accept this approach, nor is it consistent with Supreme Court precedent. The Court, reminding us that federal courts are courts of limited jurisdiction, held in *Kokkonen* that there is a presumption against a determination of federal jurisdiction and that federal court jurisdiction should "not be expanded by judicial decree." 511 U.S. at 377. It further held that, while a district court may reserve jurisdiction to enforce a settlement agreement, it must do so in its dismissal order. 511 U.S. at 381. The majority opinion is contrary to the Supreme Court's ruling in *Kokkonen* because it disregards the presumption against federal jurisdiction and expands the district court's jurisdiction to enforce the settlement agreement beyond the plain meaning of the dismissal order.

The majority's approach is also inconsistent with our own precedent. In *McAlpin v. Lexington Auto Truck Stop, Inc.*, 229 F.3d 491, 502 (6th Cir. 2000), we held, citing our earlier decision in *Caudill v. North American Media Corp.*, 200 F.3d 914 (6th Cir. 2000), that we had "joined other circuits in strictly applying the holding in *Kokkonen*." The majority argues that our previous rulings in *McAlpin* and *Caudill* are not binding because they address the scope of *Kokkonen's* second basis for a court's ancillary jurisdiction to enforce a settlement agreement-incorporation of the settlement agreement's terms in the dismissal order – and not the first basis: the inclusion of a "provision 'retaining jurisdiction' over the settlement agreement" in the dismissal order. 511 U.S. at 381.

I do not see, and the majority does not explain, why this distinction is meaningful. We have construed ancillary jurisdiction under *Kokkonen* narrowly because, as I stated, federal courts are courts of limited jurisdiction. *McAlpin* 229 F.3d at 501 (quoting *Kokkonen*, 511 U.S. at 378). This reasoning applies with equal force regardless of whether the district court incorporates the settlement agreement in the order of dismissal or includes a provision in the dismissal order reserving jurisdiction. If the majority opinion has not created a conflict among holdings in this circuit, it has created a conflict in the reasoning of its opinions.

Moreover, the holding in one of our earlier decisions is especially relevant to this case. In *McAlpin*, we outlined the contours of the second basis for a district court's ancillary jurisdiction to enforce a settlement agreement. We held that a "district court's incorporation in its dismissal order of only *one term* of the Settlement Agreement . . . is insufficient to confer jurisdiction over the *entire* agreement." 229 F.3d at 502 (emphasis added). It is true that in this case we are addressing the first basis for ancillary jurisdiction under *Kokkonen* and not the second. Yet we are really deciding the same issue: whether a partial reservation of jurisdiction over the enforcement of a settlement agreement really acts as a complete reservation. In its reliance upon a narrow distinction, the majority has eclipsed our ruling in *McAlpin* and created an unnecessary conflict in our rulings.

The majority relies upon cases from the Fifth and Seventh Circuits when it argues that a district judge need not employ formulaic language in a dismissal order to retain jurisdiction to enforce a settlement agreement. I

agree. But the majority goes well beyond this. It seeks to divine the district court's intent different from the plain language of the order when there is no evidence of that intent contemporaneous to the dismissal order. It may be (although I have considerable doubt) that a look beyond the language of the dismissal order to the assumed district judge's intent would be appropriate if the dismissal order were ambiguous and if there was strong circumstantial evidence at the time of the order that a district judge did, indeed, have a certain intent. But such is not the case here. The dismissal order's language is unambiguous and there is no such circumstantial evidence. To the extent the cases of our sister circuits cited by the majority are inconsistent with this view, I would disregard them.

Federal jurisdiction is a precise doctrine. It does not exist here. I would rely upon the reasoning in *Kokkonen* and our own case law and hold that the district court did not have jurisdiction to enforce the settlement agreement. RE/MAX should have brought a separate claim in state court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

RE/MAX INTERNATIONAL, et al, Plaintiff(s),	)	CASE NO. 1:94-CV-62
	)	JUDGE JAMES S. GWIN
v.	)	JUDGEMENT
REALTY ONE, INC., et al, Defendant(s).	)	

On September 5, 2000, Plaintiff RE/MAX International, Inc. ("RE/MAX") filed a motion to enforce its settlement agreement with Defendant Realty One, Inc. ("Realty One") [Doc. 897].[1] For the reasons set forth below, the Court grants the motion.

I.

The settlement agreement in question resolved a protracted antitrust dispute between Plaintiff RE/MAX and Defendants Realty One and Smythe Cramer. According to RE/MAX, Realty One and Smythe Cramer violated the Sherman Antitrust Act and analogous state laws by paying brokers associated with RE/MAX's franchisees lower commissions on split commission transactions.

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[1] Plaintiff RE/MAX separately filed a motion seeking an order enforcing settlement with Defendant Smythe Cramer, Co. ("Smythe Cramer") [Doc. 896]. Since this filing, Plaintiff RE/MAX and Defendant Smythe Cramer have resolved their issue.

On January 11, 1994, Plaintiff RE/MAX, along with its franchisees, filed an antitrust suit against the defendants in the United States District Court for the Northern District of Ohio.[2] After District Court Judge Dowd granted defendants' motions for summary judgment as to Plaintiff RE/MAX's federal and state antitrust claims, *RE/MAX International Inc. v. Realty One Inc.*, 924 F. Supp 1474 (N.D. Ohio 1996), RE/MAX appealed. The United States Court of Appeals for the Sixth Circuit reversed. *See Re/Max Intern., Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999). Upon remand, this case proceeded to trial on April 10, 2000.

Judge Dowd bifurcated the trial. After the presentation of the evidence, Judge Dowd instructed the jury to first decide whether the defendants had entered an agreement – an essential element of Plaintiff RE/MAX's federal antitrust claim. Following deliberations, the jury returned a verdict finding that Realty One and Smythe Cramer had illegally agreed to restrain trade.

Judge Dowd then instructed the jury to consider additional elements of Plaintiff RE/MAX's claims. During deliberations on these issues, the jurors posed a question that suggested the jurors had misunderstood Judge Dowd's instructions regarding their earlier deliberations.

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[2] As used here, "Plaintiff RE/MAX") [sic] is a collective reference to RE/MAX International, Inc., RE/MAX Northeast Ohio Limited Partnership, ("RE/MAX Northeast Ohio"), and McGrew Realty, Inc., Property Professionals, Inc., T.M.A.T.N.B., Inc., A.E.B.T.S., Inc., Joseph P. Grady, Inc., D.F.I., Inc., Zames Realty, Inc., Advantage Realty, Inc., Realty Properties, Inc., R.E.P., Inc., and True Independents Partnership (collectively, the "Franchisee Plaintiffs").

Finding the earlier misunderstanding could not be corrected, Judge Dowd declared a mistrial on June 26, 2000. After declaring a mistrial, Judge Dowd scheduled a new trial for August 7, 2000 [Doc. 854]. On that same day, the case was transferred to this Court's docket [Doc. 855]. Settlement negotiations commenced shortly thereafter.

Specifically, on June 29, 2000, the Court appointed Judge Dowd to mediate settlement discussions with the parties [Doc. 859]. After Judge Dowd's efforts to mediate the dispute were unsuccessful, the Court conducted mediation with the parties on July 11, 12, and 13, 2000.

The settlement discussions focused on two areas. First, the parties considered a monetary settlement for Plaintiff RE/MAX's claims. Second, the parties discussed limitations regarding future commission splitting and related matters.

After many hours of negotiations, the parties significantly narrowed their gap with regard to a monetary settlement. At this point, the parties' attention shifted primarily to the issues associated with their future commission-splitting relationship.

On July 13, 2000, Plaintiff RE/MAX and Defendant Smythe Cramer reached a comprehensive settlement agreement. The Court then asked RE/MAX and Smythe Cramer to state the general terms of their agreement on the record. The parties did so, and stated their understanding, confirmed by the Court on the record, that they would complete a written settlement agreement within forty-five days.

At the time the RE/MAX-Smythe Cramer settlement was reached, Defendant Realty One had refused to settle with Plaintiff RE/MAX. Realty One would not agree to the same limitations upon future conduct to which Defendant Smythe Cramer had agreed.[3]

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[3] Within itself, Defendant Realty One appeared to have different interests. These different interests impaired Realty One's willingness to settle.

After summary judgment had been given but before the Sixth Circuit had reversed Judge Dowd's grant of summary judgment, the former owners of Realty One sold their interest in Realty One to Insignia Financial Group, Inc. As part of their sales agreement for Realty One, the former owners agreed to indemnify Realty One for expenses and any judgment associated with this case. After the Sixth Circuit reversed the grant of summary judgment, these former owners became contractually obligated to defend and indemnify Realty One for expenses and any judgment in this case. Because of this contractual obligation, these former owners have already indemnified many millions of dollars of expenses and fees including expenses and fees generated in the first trial that had lasted more than ten weeks.

In seeking to settle Plaintiff RE/MAX's claims against Defendant Realty One, the former owners were able to reach an agreement in principal [sic] for financial payments sufficient to satisfy Plaintiff RE/MAX. As to such financial payments on behalf [sic] Realty One, Insignia Financial Group, Inc. refused to make any contribution. Insignia Financial Group refused contribution even though some argument existed that the former owners duty to indemnify and defend only extended to claims arising during their tenure, not to claims or damages arising during Insignia's ownership.

Although the former owners of Defendant Realty One offered sufficient monies to settle Plaintiff RE/MAX's claim, the current management of Realty One refused to agree to the same limitations on conduct agreed to by Defendnt Smythe Cramer. Of course, Smythe Cramer was paying its own expenses and

However, as Plaintiff RE/MAX and Defendant Smythe Cramer confirmed their agreement on the record, Defendant Realty One unexpectedly stated that it desired a settlement on the same terms as to future conduct that Plaintiff RE/MAX had agreed upon with Smythe Cramer. Only minutes before this, Defendant Realty One had refused to reach settlement on these same terms and had professed itself ready for trial.

Plaintiff RE/MAX agreed to Defendant Realty One's offer to agree to the same terms regarding future conduct as negotiated by Defendant Smythe Cramer. With its change of face and speedy retreat from its professed willingness to allow a jury to decide its liability, Defendant Realty One agreed to pay much more than the amount agreed upon by Defendant Smythe Cramer.

II

As a preliminary matter, the Court discusses Defendant Realty One's argument that this Court does not have jurisdiction to rule upon Plaintiff RE/MAX's motion to enforce settlement.

Federal courts are courts of limited jurisdiction. They may exercise only those jurisdictional powers that are authorized by the United States Constitution or a federal

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would be risking its own assets if it proceeded to trial. In contrast, the current owner of Realty One, Insignia Financial Group, Inc. seemed willing to spend the former owner's monies on expenses and risk the former owner's assets to respond to any potential judgment.

statute. *See Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).

In this case, Plaintiff RE/MAX originally asserted violations of the federal antitrust laws. Under 28 U.S.C. § 1331, federal courts have original jurisdiction over all claims arising under federal law. Thus, this Court possessed jurisdiction over RE/MAX's original complaint.

However, in seeking to enforce its settlement agreements with the defendants, Plaintiff RE/MAX no longer asserts violations of federal law. Instead, RE/MAX essentially asserts a breach of contract claim. This claim does not fall within the Court's original jurisdiction.

Nevertheless, 28 U.S.C. § 1367 grants federal courts supplemental jurisdiction over claims so related to claims within the court's original jurisdiction that they form part of the same case or controversy under Article III of the Constitution. This grant of supplemental jurisdiction allows a federal court to retain jurisdiction over future enforcement of a settlement agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-81 (1994) (explaining that ancillary jurisdiction allows a court to, among other things, "manage its proceedings, vindicate its authority, and effectuate its decrees"); *Futernick v. Sumpter Township*, 207 F.3d 305, 310 (6th Cir. 2000); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (stating that it is well settled that "courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them").

A court need not invoke any magic words to retain jurisdiction to enforce a settlement agreement. Rather, "all that is necessary is that it be possible to infer that [the

trial judge] did intend to retain jurisdiction – that he did not dismiss the case outright, thereby relinquishing jurisdiction." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985).

Specifically, a federal court maintains jurisdiction to enforce a settlement agreement when the parties' obligation to comply with the settlement agreement is "part of the order of dismissal – either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Futernick*, 207 F.3d at 310 (quoting *Kokkonen*, 511 U.S. at 381).

Here, the language referred to the settlement agreement used by the Court in its order of July 14, 2000, [Doc. 884] makes clear that the Court intended to retain jurisdiction to enforce the agreement.[4] The Court did more than simply refer to the settlement agreement of the parties. *See Caudill v. North American Media Corp.*, 200 F.3d 914, 917 (6th Cir. 2000) (finding district court failed to retain jurisdiction to enforce settlement agreement where

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[4] The Court's order of July 14, 2000, dismissing the case reads in its entirety:

Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000 – July 13, 2000. During said conferences, settlement talks took place. After diligent effort on all sides, the parties have settled this [sic] Therefore,

IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice."

FURTHER, Any [sic] subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

dismissal order merely mentioned the settlement agreement). Instead, the Court expressly reserved the right to make further orders regarding the settlement agreement. The Court also explicitly stated that further orders regarding the settlement agreement and the dismissal of the case would supersede the order of July 14, 2000.

This language shows a clear reservation by this Court of jurisdiction over matters concerning the settlement agreement. Accordingly, the Court retains jurisdiction over matters involving the enforcement of the settlement agreement.

III

The Court now turns to Plaintiff RE/MAX's contention that Defendant Realty One failed to keep its settlement agreement. Specifically, RE/MAX says Defendant Realty One has refused to memorialize its settlement.

Arguing otherwise, Defendant Realty One contends that the parties never agreed to memorialize their settlements. The Court disagrees.

At the time the Court recorded the outline of the agreement between Plaintiff RE/MAX and Defendant Smythe Cramer, the parties commented:

> MR. LINIGER [RE/MAX's Chairman]: This becomes effective today *and we would just handle the details?*[5]

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[5] Later, Plaintiff RE/MAX and Defendnt [sic] Smythe Cramer agreed that the agreement would take effect 45 days later.

Shortly after, Defendant Smythe Cramer's Chairman, Lucius McKelvey, confirmed that documentation would be prepared to memorialize the parties agreement:

> MR. McKELVEY: Your Honor, is it implicit that the attorneys are thus mandated *to complete the written agreement within the 45 day time frame, right?*
>
> THE COURT: Yes.
>
> MR. McKELVEY: That's a given.

Plaintiff RE/MAX agreed.[6]

As previously described, Defendant Realty One abruptly decided to settle with Plaintiff RE/MAX on the same terms, except for money, earlier agreed to by Defendant Smythe Cramer. During earlier negotiations, Plaintiff RE/MAX and Defendant Realty One understood that agreement was necessary on all major issues. There was no agreement to settle on some, but not all issues. At the time that Realty One's willingness to go to trial collapsed, no further negotiations occurred. Instead, Realty One simply said it would pay a much larger amount of money to obtain whatever deal Defendant Smythe Cramer had negotiated. Thus, in interpreting Realty One's settlement agreement, the Court finds the negotiations between RE/MAX and Smythe Cramer important, not the negotiations between RE/MAX and Realty One. Moreover, Defendant Realty One acknowledged that the parties would memorialize their settlement agreement. In

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[6] One of Plaintiff RE/MAX's attorney, [sic] Terence Quinn, responded: "Sure, that's fine."

informing the Court of its sudden desire to settle, Realty One itself acknowledged that a written settlement agreement would be prepared. Realty One's surprise retreat occurred as follows:

> THE COURT: I look at my calender, [sic] as against Realty One we are going to start it [the jury trial] on the 7th [August 7, 2000].
>
> MR. GORMAN: As to Realty One, we are in agreement to the financial terms we discussed earlier, same terms to the financial arrangement we discussed earlier. I don't know the number.
>
> MR. QUINN: So you are agreeing now to settle?
>
> MR. GORMAN: Yes.
>
> MR. QUINN: Same terms?
>
> MR. GORMAN: Same terms.
>
> * * *
>
> THE COURT: Just to be clear, under the same terms, Mr. Gorman, with the exception being that Realty One would pay the sum of $6,666,666.
>
> MR. GORMAN: Yes, your Honor, Realty One would pay that sum coming from, as mentioned earlier, the two Avenis, Joe Aveni and Vince Aveni and Jim Miller [the former owners] on behalf of Realty One. And we adopt the same terms and *will draft*

the papers in the same time period.

Accordingly, the Court finds the Plaintiff RE/MAX and Realty One agreed that written documentation of their agreement would be prepared. In failing to agree upon the expression of their agreement, the defendants have failed to comply with their settlement agreement. The Court therefore grants Plaintiff RE/MAX's motion to enforce the parties' settlement.

In granting this motion, the Court enters the following judgment as between Plaintiff RE/MAX and Defendant Realty One:

In this case the Plaintiffs made claims against Smythe, Cramer Co. ("Smythe, Cramer") and Realty One, Inc. ("Realty One") in these actions filed in the United States District Court for the Northern District of Ohio. Realty One denied liability, asserted affirmative defenses as to some or all of those claims and made counterclaims against the Plaintiffs. The Plaintiffs have denied the counterclaims.

After conference with the Court as described above, the parties settled their dispute on July 13, 2000, under the following terms, without admission by any party of liability.

Definitions. As used herein, the following terms shall have the meanings indicated:

(a) "MLS" shall mean a multiple listing service, and shall include, without limitation, both the Northern Ohio Regional Multiple Listing Service ("NORMLS") and the Centralized Real Estate Information Services,

Inc. ("CRIS") and Akron Area Multiple Listing Service ("AAMLS"), as well as any successor to either NORMLS, CRIS or AAMLS and any other multiple listing service in which residential properties are or may be listed by defendants in the Northeast Ohio area.

(b) The "Northeast Ohio area" shall consist of those counties that comprise the geographical jurisdiction of the Northern District of Ohio, Eastern Division.

(c) "RE/MAX Broker" shall mean any residential real estate brokerage firm (i) operating, at present or in the future, under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International (ii) in the Northeast Ohio area. Without limiting this definition, the Franchisee Plaintiffs are included within the scope of the term "RE/MAX Broker" for the periods during which they operated or operate under their respective franchise agreements. The term "RE/MAX Broker," as used herein, shall not include any Franchisee Plaintiff or other residential real estate brokerage firm that has a court action (other than the Actions and court actions relating to property-specific or transaction-specific matters involving a buyer or seller client) now pending against Defendant Realty One.

(d) "Special notice letter" shall mean a written notification by defendants to a broker in which a defendant (i) offers to compensate the addressee broker on the sale of a defendant listing by the addressee broker or any

of its agents (either as buyer's agent or as subagent) at a level lower than that offered generally by the defendant to other brokers through the listing of the property with an MLS or (ii) declines to co-broke on defendant listings.

(e) "RE/MAX business model" shall mean the methods of operating and developing a residential real estate brokerage office, as taught and/or promoted by RE/MAX International to new and existing franchisees.

2. *Dismissal of Related Action.* RE/MAX Northeast Ohio shall dismiss with prejudice the action filed in the Cuyahoga County Court of Common Pleas, known as *Thomas Hurd v. Vincent Aveni, et al.*, Case No. 299512.

3. *Plaintiffs' Release and Covenant Not to Sue.* Each Plaintiff, for and on behalf of itself and its principal(s), officers, directors, successors and assigns, will execute releases fully and forever releasing and discharging Defendant Realty One and their principal(s), officers, directors, agents, successors and assigns, of and from any and all claims, demands, actions or causes of action whatsoever, whether known or unknown, including, without limiting the generality of the foregoing, any and all claims, demands, actions or causes of action which were or could have been asserted in the Actions. Each Plaintiff will agree and covenant forever to refrain from instituting, procuring, or directly or indirectly funding any suit, cause of action or claim for relief against Defendant Realty One that in any way relates to or arises from any alleged act or agreement of defendants that occurred

prior to the date of July 13, 2000. Nothing in this paragraph, however, shall be construed to preclude any RE/MAX Broker from asserting any claim or cause of action (a) arising from a property-specific or transaction-specific matter involving a buyer or seller client or (b) coming within the jurisdiction of a Board of Realtors or the Ohio Division of Real Estate.

4. *Defendant Realty One Release and Covenant Not to Sue.* Defendant Realty One for and on behalf of itself and its principal(s), officers, directors, successors and assigns, will execute releases fully and forever releasing and discharging each Plaintiff and its respective principal(s), officers, directors, agents, successors and assigns, of and from any and all claims, demands, actions or causes of action whatsoever, whether known or unknown, including, without limiting the generality of the foregoing, any and all claims, demands, actions or causes of action which were or could have been asserted in the Actions. Defendant Realty One will agree and covenant forever to refrain from instituting, procuring, or directly or indirectly funding any suit, cause of action or claim for relief against any Plaintiff that in any way relates to or arises from any alleged act or agreement of the Plaintiff that occurred prior to July 13, 2000. Nothing in this paragraph, however, shall be construed to preclude Defendant Realty One from asserting any claim or cause of action (a) arising from a property-specific or transaction-specific matter involving a buyer or seller client or (b) coming within the jurisdiction of a Board of Realtors or the Ohio Division of Real Estate.

5. *Settlement Amount.* Defendant Realty One shall pay, and RE/MAX International shall receive on behalf of

each and all of the Plaintiffs, the total amount of Six Million Six Hundred Sixty-Six Thousand Six Hundred Sixty-Six Dollars ($6,666,666), to be paid as follows:

(a) An initial payment of $3,333,333 to be paid within five business days of the entry of this judgment after receipt by Realty One of the releases executed by all of the Plaintiffs; and

(b) Ten semi-annual installment payments, commencing six months after the initial payment and payable each six months thereafter. Each installment payment shall be in the principal amount of $366,666.60 plus interest accrued on the balance of the Gross Payment owed at the time the installment is paid at the rate payable on five year Treasury Bills as of the date of the initial payment under paragraph 5(a). The prepayment of any installment is expressly permitted.

All payments by the Defendant Realty One shall be made by certified check payable to RE/MAX International or its written designee. Defendant Realty One assumes no responsibility for the distribution among Plaintiffs of any payment described herein, and RE/MAX International shall indemnify and hold harmless Defendant Realty One, their principal(s), officers, directors, agents, successors and assigns from any claim, demand, action or cause of action with respect to any matter arising out of such distribution, its amount or the failure to make or receive such a distribution.

6. *Withdrawal of Special Notice Letters.* Defendant Realty One shall withdraw all special notice letters to any

RE/MAX Broker. This withdrawal shall be effective with respect to any offer or counter-offer to purchase or sell a property that has been accepted in writing on or after August 28, 2000. As to any transaction resulting from such an accepted offer or counter-offer and closing on or after August 28, 2000 but prior to receipt by the Defendant Realty One of executed release documents executed by all of the Plaintiffs, any difference between the commission actually paid by Defendant Realty One to the RE/MAX Broker at closing and the commission offered by Defendant Realty One listing of the property in the relevant MLS (to all cooperating brokers that have not received a special notice letter) shall be paid to such RE/MAX Broker no later than ten days after the entry of this Judgment. In addition, Defendant Realty One will stop any policy of issuing a special notice letter to all new RE/MAX franchisees in the Northeast Ohio area.

7. *Future Special Notice Letters.* Effective July 13, 2000, any subsequent issuance of a special notice letter to a RE/MAX Broker in the Northeast Ohio area by Defendant Realty One during the term of the Dispute Resolution Mechanism appended hereto shall be subject to the following conditions:

(a) *Limitations on Future Special Notice Letters.* Defendant Realty One shall not issue any special notice letter to a RE/MAX Broker based, expressly or in purpose and practical effect upon (i) its affiliation with RE/MAX International and/or (ii) its use of the RE/MAX business model. Defendant Realty One may issue a special notice letter to a RE/MAX Broker only for reasons consistent with its policy and practices,

whether currently in effect or hereafter adopted by Defendant Realty One, applicable to all real estate brokers in the Northeast Ohio area.

(b) *Formal Requirements of Special Notice Letters.* Any special notice letter issued by Defendant Realty One to a RE/MAX Broker shall be sent by certified mail, return receipt requested, with a copy to RE/MAX International by certified mail. The terms described in the special notice letter shall not become effective until 30 days after the date that it is mailed. The special notice letter shall state the reasons for Defendant Realty One's decision to take the actions stated in the special notice letter.

(c) *Dispute Resolution.* Any RE/MAX Broker receiving a special notice letter may demand arbitration pursuant to the Dispute Resolution Procedure appended hereto. Any such demand for arbitration must be sent to the defendant by certified mail, return receipt requested, within 90 days from the date of the special notice letter. A failure to send a timely written demand waives all objections to the special notice letter by the RE/MAX Broker.

(d) *Applicability of Dispute Resolution Procedure.* The provisions of and procedures described by the Dispute Resolution Procedure shall be applicable, until its expiration, to all Franchisee Plaintiffs and any other current or future RE/MAX Broker that submits the a [sic] copy of the Dispute Resolution Procedure executed by it with its written agreement to be bound by its terms, and no

Plaintiff or other RE/MAX Broker executing the Dispute Resolution Agreement may assert any claim or cause of action arising from a special notice letter except to enforce the provisions of this Settlement Agreement, the Dispute Resolution Procedure or an arbitration award under it.

(e) *Payment of Commissions When A Special Notice Letter is Invalidated.* In the event that a future special notice letter is required to be withdrawn by the decision of an arbitrator and transactions affected by the special notice letter closed subsequent to its effective date, Defendant Realty One shall pay to the RE/MAX Broker within ten days of that decision any difference between the commission actually paid by the defendant to the RE/MAX Broker at closing and the commission offered by the defendant's listing of the property in the relevant MLS (to all cooperating brokers that have not received a special notice letter).

8. *Construction.* The parties settlement and documentation of that settlement is not construed as an admission of liability or culpability by the Defendant Realty One with respect to any claim made against them in the Actions or otherwise, such liability or culpability being expressly denied by Defendant Realty One. Except as provided in this judgment and the Dispute Resolution Procedure, the Defendant Realty One does not waive, compromise, surrender or abandon any right it has, has had or may have in the future to decide independently the terms upon which it will or will not deal with, or offer to deal with, any real estate broker, such rights, as they

may exist from time to time, being expressly reserved by Defendant Realty One, subject only to the provisions of this Judgment.

9. *Jurisdiction.* This Court shall retain continuing jurisdiction to enforce the provisions of this judgment.

IT IS SO ORDERED.

Date: September 14, 2000

/s/ James S. Gwin
Hon. James S. Gwin
U.S. District Court

DISPUTE RESOLUTION PROCEDURE

In accord with the parties' agreement, the Court orders that the parties shall use the following procedures to resolve their disputes:

1. *Definitions.* As used herein, the following terms shall have the meanings indicated:

(a) "MLS" shall mean a multiple listing service, and shall include, without limitation, both the Northern Ohio Regional Multiple Listing Service ("NORMLS") and the Centralized Real Estate Information Services, Inc. ("CRIS") and Akron Area Multiple Listing Service ("AAMLS"), as well as any successor to either NORMLS, CRIS or AAMLS and any other multiple listing service in which residential properties are or may be listed by Defendant Realty One in the Northeast Ohio area.

(b) The "Northeast Ohio area" shall consist of those counties that comprise the geographical jurisdiction of the Northern District of Ohio, Eastern Division.

(c) "RE/MAX Broker" shall mean any residential real estate brokerage firm (i) operating, at present or in the future, under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International (ii) in the Northeast Ohio area. Without limiting this definition, the Franchisee Plaintiffs are included within the scope of the term "RE/MAX Broker" for the periods during which they operated or operate under their respective franchise agreements. The term "RE/MAX Broker," as used herein, shall not include any Franchisee Plaintiff or other residential real estate brokerage firm that has a court action (other than the Actions and court actions relating to property-specific or transaction-specific matters involving a buyer or seller client) now pending against Defendant Realty One.

(d) "Special notice letter" shall mean a written notification by Defendant Realty One to a broker in which Realty One (i) offers to compensate the addressee broker on the sale of Realty One's listing by the addressee, broker or any of its agents (either as buyer's agent or as subagent) at a level lower than that offered generally by Realty One to other brokers through the listing of the property with an MLS or (ii) declines to co-broke on Realty One's listings.

(e) "RE/MAX business model" shall mean the methods of operating and developing a residential real estate brokerage office, as taught and/or promoted by RE/MAX International to new and existing franchisees.

2. *Formal Requirements of Special Notice Letters.* Any special notice letter issued by Defendant Realty One to a RE/MAX Broker shall be sent by certified mail, return receipt requested, with a copy to RE/MAX International by certified mail. The terms described in the special notice letter shall not become effective until 30 days after the date that it is mailed. The special notice letter shall state all the reasons for Realty One's decision to take the actions stated in the special notice letter.

3. *Objection to Special Notice Letter and Demand for Arbitration.* A RE/MAX Broker that has received and objects to a special notice letter from Defendant Realty One may demand arbitration as specified in paragraph 4(b). Any such demand for arbitration shall be in writing and must be sent to Realty One within 90 days from the date of the special notice letter. Failure to send a timely written demand waives all objections to the special notice letter by the RE/MAX Broker.

4. *Dispute Resolution Procedures.*

(a) *Informal Discussions.* The parties agree to use good faith efforts to resolve issues relating to the issuance of special notice letters without proceeding to arbitration, including, without limitation, withdrawal of a special notice letter where the conduct or circumstance giving rise to the issuance of it has been cured.

(b) *Arbitration Procedure.* The Arbitrator shall expeditiously conduct a hearing to determine the validity of the stated ground(s) for the RE/MAX Broker's objection(s). The parties shall use their best efforts to arrange for the hearing within 30 days of the demand for arbitration. The Arbitrator shall order discovery between the parties on the issue presented to the extent needed and appropriate. The Arbitrator shall have sole authority to hear an objection under this Dispute Resolution Procedure, establish the procedural rules for the hearing, adjudicate procedural or discovery disputes and determine any other matters the parties may agree to submit to him. To the extent consistent with this Dispute Resolution Procedure, the procedures prescribed or authorized by the Ohio Arbitration Act, Ohio Rev. Code § 2711.01, *et seq.*, shall be employed in any arbitration hereunder.

(c) *Issues to Be Determined.* The Arbitrator shall decide whether Defendant Realty One's decision to issue the special notice letter at issue was: (i) based, whether expressly or in purpose and practical effect, upon the RE/MAX Broker's affiliation with RE/MAX International, (ii) or its use of the RE/MAX business model; (iii) made other than independently; or (iv) made in a manner or for reasons inconsistent with Realty One's policies and practices applicable to all real estate brokers in the Northeast Ohio area. The burden of proof shall be on the RE/MAX Broker to establish the foregoing issues by a preponderance of the evidence. If any of the foregoing issues is decided in

the affirmative by the Arbitrator, then the RE/MAX Broker shall be the prevailing party, and Defendant Realty One shall immediately withdraw the special notice letter. If all of the foregoing issues are decided in the negative by the Arbitrator, then Realty One shall be the prevailing party, and the special notice letter shall remain in effect.

(d) *Effect of Arbitrator's Decision.* In the event that a future special notice letter is required to be withdrawn by the decision of an arbitrator and transactions affected by the special notice letter closed subsequent to its effective date, Defendant Realty One shall pay to the RE/MAX Broker within ten days of that decision any difference between the commission actually paid by Realty One to the RE/MAX Broker at closing and the commission offered by Realty One's listing of the property in the relevant MLS (to all cooperating brokers that have not received a special notice letter).

(e) *Arbitrator's Decision Binding.* The Arbitrator's determination shall be binding and final. All proceedings shall be conducted and enforceable in accordance with, and subject to, the Ohio Arbitration Act, Ohio Rev. Code. § 2711.01, *et seq.* The Arbitrator's decision shall not be admissible as evidence or have any precedential effect in any subsequent arbitration or proceeding by or among the parties concerning the issuance of another special notice letter; provided, however, a previous decision or

award may be used to establish that a subsequent dispute between a RE/MAX Broker and Defendant Realty One was decided already as between the same RE/MAX Broker and Realty One in a previous arbitration with respect to the same or previous special notice letter.

5. *Appointment of Arbitrator.*

(a) *Initial Appointment.* Within 10 days from the date a demand for arbitration is received by Defendant Realty One the parties agree jointly to select and appoint an arbitrator to whom the dispute shall be submitted. If the parties cannot agree upon an arbitrator within the 10 day period, either party may demand that an arbitrator be appointed by the American Arbitration Association ("AAA") from a list of potential arbitrators with knowledge of real estate law and the residential real estate brokerage business. Under no circumstances shall an arbitrator be appointed by the AAA who is or has been (i) a member of the Ohio Association of Realtors or of any Board of Realtors in the Northeast Ohio area, including, without limitation, the Cleveland Area Board of Realtors; (ii) a sales agent, employee or principal of RE/MAX International or any RE/MAX franchisee, sub-franchisee or affiliate; or (iii) a sales agent, employee or principal of Defendant Realty One or any affiliate thereof, or any current or former member of the groups known or formerly known as The Dozen or The Masterminds. By this appointment, the parties irrevocably waive any objection to the Arbitrator

under this Dispute Resolution Procedure other than objections based upon bias or financial interest, which must be established by clear and convincing evidence.

(b) *Arbitrator's Duty.* Any arbitrator must agree to serve and to conduct the arbitration in accordance with the terms of this Dispute Resolution Procedure.

6. *Costs.* The parties to any arbitration under this Dispute Resolution Procedure will each pay one half of the Arbitrator's fee and incidental expenses. The parties otherwise will bear their own costs.

7. *Waiver of Other Remedies.* The parties irrevocably waive any and all rights to adjudicate any objection to or claim arising from a special notice letter in any forum other than the proceedings described in this Dispute Resolution Procedure.

8. *Termination of this Dispute Resolution Procedure.* This Dispute Resolution Procedure shall expire July 13, 2005, or at such time as those brokers operating under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International have entered into residential real estate listing agreements constituting 20% of all residential listings (measured by number of listings) processed in the Northeast Ohio area during any calendar quarter, whichever shall first occur.

9. *Applicability.* The provisions of and procedures described by this Dispute Resolution Procedure shall be applicable, until its expiration, to all current RE/MAX Brokers and any future RE/MAX Broker that submits a copy of the Dispute Resolution Procedure executed by it

with its written agreement to be bound by its terms, and no Plaintiff or future RE/MAX Broker executing the Dispute Resolution Procedure may assert any claim or cause of action arising from a special notice letter issued on or after the date of the Settlement Procedure except to enforce the provisions of the Settlement Agreement, the Dispute Resolution Procedure or an arbitration award thereunder.

10. *Notices.* All notices and communications to Defendant Realty One in connection with this Dispute Resolution Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to:

Realty One, Inc.
Realty One Corporate Center
6000 Rockside Woods Boulevard
Cleveland, Ohio 44131-2350
Attention: Chairman

All notices and communications to RE/MAX International in connection with this Settlement Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to:

RE/MAX International, Inc.
David L. Liniger
8390 East Crescent Parkway
Greenwood Village, Colorado 80111-28000

All notices and communications to RE/MAX Northeast Ohio in connection with this Settlement Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to:

RE/MAX Northeast Ohio, Inc.
Sylvia Babineau
P.O. Box 8172
Longboat Key, Florida 34228

All notices and communications to the Plaintiff Franchisees in connection with this Settlement Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to the relevant party:

D.F.I., Inc.
Dennis Falvey
9954 Johnnycake Ridge Road
Concord, Ohio 44077

Zames Realty, Inc.
Robert Zames
10556 Clear Lake Drive
Concord, Ohio 44077

McGrew Realty, Inc.
Carol McGrew
724 Diandrea Drive
Akron, Ohio 44333

RE/MAX Advantage, Inc.
Donald Greif/James Sinkula
6693 Miller Drive
North Ridgeville, Ohio 44039

Property Professionals, Inc.
Yvonne Highley
116 North Main Street
Hudson, Ohio 44236

Realty Properties, Inc.
Sylvia Babineau
P.O. Box 8172
Longboat Key, Florida 34228

T.M.A.T.N.B., Inc.
Dennis Steed
13500 Pearl Road
Strongsville, Ohio [sic]

R.E.P., Inc.
Joseph Steets
8004 Hillside Road
Independence, Ohio 44131

A.E.B.T.S., Inc.
Dennis Steed
13500 Pearl Road
Strongsville, Ohio 44136

True Independent Realty
Thomas Hurd
12550 Lake Avenue #1004
Lakewood, Ohio 44107

Joseph P. Grady, Inc.
Joseph Grady
3225 Amblewood Court, NE
Atlanta, Georgia 30345

Copies of all notices and communications hereunder to any other Plaintiff shall also be mailed to RE/MAX International at the address set forth above.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

RE/MAX INTERNATIONAL, et al,	)	
	)	Case No 1:94cv62
Plaintiff(s),	)	1:96cv101
	)	
-vs-	)	
REALTY ONE, INC., et al,	)	ORDER
	)	
Defendant(s).	)	

Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000 – July 13, 2000. During said conferences, settlement talks took place. After a diligent effort on all sides, the parties have settled this Therefore,

IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice".

FURTHER, Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

/s/ James S. Gwin
JUDGE JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RE/MAX INTERNATIONAL, et al.,	)	
Plaintiffs,	)	Civil Action No.
vs.	)	1:94cv62
REALTY ONE, INC., et al,	)	
Defendants.	)	

TRANSCRIPT OF SETTLEMENT AGREEMENT HAD BEFORE THE HONORABLE JAMES S. GWIN, JUDGE OF SAID COURT, ON THURSDAY, JULY 13, 2000 AT 4:15 O'CLOCK P.M.

APPEARANCES:

For the Plaintiffs:

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TERRY BURKE, ESQ.
General Counsel

For the Defendant Smythe Cramer: JOHN J. EKLUND, ESQ.
Calfee, Halter & Griswold
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800 Superior Avenue
Cleveland, Ohio 44114-2688

Court Reporter: Richard G. DelMonico
568 U.S. District Court
Two South Main Street
Akron, Ohio 44308
(330) 535-2280

[3] THE COURT: This is case number 94-CV-062, RE/MAX international versus Realty One, et al, including defendant Symthe,* Cramer Company.

The case came before the court today for purposes of a final pretrial. After discussions with defendant Symthe, Cramer Company and the plaintiffs, the parties have settled their dispute. Under the terms of that settlement, the Defendant Symthe, Cramer Company would pay to the plaintiff the sum of $3,666,666.

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* Smythe is misspelled throughout this transcript which is reproduced verbatim.

In consideration for this payment, together with certain additional covenants and agreements, upon consideration of this payment, the plaintiffs would dismiss this case as against that defendant only, with prejudice, and would execute releases as running against all of Symthe, Cramer Company and its principals and agents.

In addition to this payment, the parties have agreed upon certain additional matters. Under t-hose [sic] additional matters, the plaintiff would accept the payment of this $3,666,666 over some period of time. That payment would be made with an initial down payment, approximating one half of that amount, to be made within a reasonable time, plaintiffs then agreeing to accept payments on the remaining balance over a period of, I believe we talked about, five years, which balance would be payable with [4] interest at, believe the discussion was, prime plus one.

MR. McKELVEY: Your Honor, that was thrown cut [sic]. We would recommend whatever the five year paper is, whatever the five year T bill rate is. We don't borrow it at prime, we borrow it below prime. Whatever the five year T bill rate is.

THE COURT: Is that acceptable?

MR. LINIGER: Yes.

THE COURT: In further consideration of the dismissal of this action, the defendant Symthe, Cramer would agree to stop the adverse split policy as against all RE/MAX principals and agents.

Going into the future. The defendant Symthe, Cramer would have the right to impose adverse commission splits under the following terms:

First, before imposing such adverse splits Symthe, Cramer would give notice at least 30 days before the imposition of those adverse splits, setting forth all reasons for the split.

The party and agency, RE/MAX agency, as against whom the adverse split was being imposed would have a right to contest that before a disinterested arbitrator to be chosen by the parties. And the parties would both mutually agree to bear one half the cost of that arbitration, and both would commit to facilitating that [5] arbitration.

It is further agreed, with regard to the imposition of adverse splits, that the defendant Symthe, Cramer would not impose any adverse splits based upon the business model used by plaintiff RE/MAX or its agents, and would do so only for reasons consistent with the imposition of adverse splits among other real estate agencies in the Cleveland, Ohio area.

MR. McKELVEY: Can we say North Eastern Ohio, your Honor?

THE COURT: North Eastern Ohio.

Is that the agreement that has been reached, Mr. Quinn, on behalf of your client?

MR. QUINN: I'm just checking my notes.

MR. LINIGER: This becomes effective today and we would just handle the details?

MR. McKELVEY: May I ask that –

THE COURT: Let's just go off the record.

(Discussion off the record.)

THE COURT: This would go into effect within 45 days.

It's further the agreement of the parties that this right to arbitrate would continue for five years or for such period of time at which RE/MAX International and its agents reached, I believe the agreement was, 15 [6] percent.

MR. QUINN: 20 percent, your Honor, was the agreement.

THE COURT: 20 percent in the Cleveland, North Eastern Ohio area, whichever came first. Is that the agreement you've reached?

MR. LINIGER: Yes, sir, it is.

THE COURT: Mr. Quinn?

MR. QUINN: Yes, it is.

THE COURT: Mr. Eklund.

MR. EKLUND: Yes.

THE COURT: Mr. McKelvey?

MR. McKELVEY: May I have just one second, your Honor?

THE COURT: And just to be clear, each party to bear their own attorneys fees, and each party to bear their own costs.

MR. McKELVEY: Your Honor, is it implicit the attorneys are thus mandated to complete the written agreement within the 45 day time frame, right?

THE COURT: Yes.

MR. McKELVEY: That's a given.

THE COURT: Yes.

MR. QUINN: Sure, that's fine.

THE COURT: Is that the agreement, Mr. Eklund.

[7] MR. EKLUND: Yes.

THE COURT: Mr. McKelvey?

MR. McKELVEY: Yes.

THE COURT: Thank you very much.

MR. McKELVEY: Thank you, your Honor.

THE COURT: I looked at my calendar, as against Realty One we are going to start it on the 7th.

MR. GORMAN: As to Realty One, we are in agreement to the financial terms we discussed earlier, same terms to the financial arrangements we discussed earlier. I don't know the number.

MR. QUINN: So you are agreeing now to settle?

MR. GORMAN: Yes.

MR. QUINN: Same terms?

MR. GORMAN: Same terms.

MR. QUINN: 10 million – No, that's the total. $6,666,666.

MR. GORMAN: $6,666,666 is for Realty One.

THE COURT: Just to be clear, under the same terms, Mr. Gorman, with the exception being that Realty One would pay the sum of $6,666,666.

MR. GORMAN: Yes, your Honor, Realty One would pay that sum coming from, as mentioned earlier., the two Avenis, Joe Aveni and Vince Aveni and Jim Miller on behalf of Realty one. And we adopt the same terms and will draft [8] the papers in the same time period.

THE COURT: Is that acceptable to you?

MR. QUINN: Yes, it is.

THE COURT: Thank you very much.

MR. McKELVEY: Thank you for your hard work and your creativity.

CERTIFICATE

I, Richard G. DelMonico, Official Court Reporter in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

/s/ Richard G. DelMonico
Richard G. DelMonico,
Official Court Reporter
404 U.S. Courthouse
Two South Main Street
Akron, Ohio 44308
(330) 535-2280

Federal Rules of Civil Procedure

Rule 41. Disr issal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation.

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court.

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim

The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action.

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Filed Under Seal

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4235 –

RE/MAX INTERNATIONAL, INC., *et al.*,
Plaintiffs-Appellees,

RE/MAX NORTHEAST OHIO LIMITED PARTNERSHIP, *et al.*,

Intervenors-Appellees,

v.

REALTY ONE, INC.,

Defendant-Appellant,

SMYTHE CRAMER CO.,

Defendant

Appeal from the United States District Cow [sic]
for the Northern District of Ohio, Eastern Division
Case Nos. 1:94 CV 0062 & 1:96 CV 0101

FINAL BRIEF OF APPELLEES

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Attorneys for Intervenors-Appellees

* * *

Finally, Realty One asserts that "permitting the court here to use a post dismissal construction of vague language would eviscerate *Kokkonen*." Def. Br. at 34. Realty One does not – and cannot – explain why this is so. Permitting the district court to exercise jurisdiction here makes good sense. The parties reached settlement only after a long and bitter dispute spanning years of litigation, an appeal, and a three-month trial, and the settlement imposed significant restrictions upon the defendants' future conduct. Under such circumstances. there was an obvious risk of dispute over the details of the written agreement, and it was therefore prudent and responsible for the judge who supervised the settlement to retain jurisdiction.

B. The District Court Could Not Have Relinquished Jurisdiction Over The Settlement on July 14.

In addition to relying upon a non-existent requirement, Realty One also mistakenly assumes that the district court had authority on July 14 to dismiss this case unconditionally under Rule 41(a)(2). That rule deals with voluntary dismissal and provides that "an action shall not be dismissed *at the plaintiff's instance* save upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2) (emphasis added). Thus, the rule "requires the plaintiff to move for leave to dismiss by order of the Court." 8 James Wm. Moore *et al.*, *Moore's Federal Practice* § 41.20, at 41-29 (3d ed. 2000). RE/MAX did not, however, file such a motion (or enter into a stipulation of dismissal as in *Kokkonen*). Nor could the district court have found that RE/MAX implicitly requested dismissal: although RE/MAX promised that it "would dismiss this case," it did so "[i]n consideration for [a multi million dollar] payment, together with certain additional covenants and agreements." Settlement TR 3. Since those obligations did not become effective until August 28, *see supra p. 10*, the district court could not have unconditionally dismissed the case on July 14 even if it had tried. *See, e.g., MGM. v. 007 Safety Prods.*, 83 F.3d at 14; *Lehman v. Revolution Portfolio LLC*, 166 F.3d 389, 392 (1st Cir. 1999); *Ford v. Neese*, 119 F.3d at 562.

II. REALTY ONE BREACHED ITS DUTY TO COMPLETE A WRITTEN SETTLEMENT AGREEMENT.

In the decision below, the district court found that Realty One had an obligation to complete a written settlement agreement and that Realty One breached that obligation. *See* Judgment at 7-10. On appeal, Realty One no longer seriously disputes the existence of this obligation. Instead, it contends that the district court erred in finding a breach. *See* Def. Br. at 53-55. To do so, however, Realty One must show that Judge Gwin committed plain error. *See supra p.* 20. Realty One does not even begin to satisfy this heavy burden. To the contrary, the

* * *

order to ensure that RE/MAX enjoyed the efficient remedy for which it had bargained.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Dated: March 16, 2001

Respectfully submitted,

/s/ Stephen J. Squeri
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